

(17,020.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 435.

JAMES NICOL, APPELLANT,

vs.

JOHN AMES, UNITED STATES MARSHAL FOR THE
NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Petition for writ of <i>habeas corpus</i>	4	2
Exhibit A—Warrant of commitment	9	5
B—Act of legislature of the State of Illinois incor- porating the Chicago board of trade, approved February 18, 1859	10	6
Exhibit C—Record of the district court of the United States for the northern district of Illinois in case of The United States <i>vs.</i> James Nicol	14	8
Caption	14	8
Order to file information and docket cause	15	8
Information	15	8
Affidavit of James H. Milne	17	10
Order to issue bench warrant	18	10
Bench warrant	18	11
Marshal's return	19	11

	Original.	Print.
Motion to quash information	20	12
Order overruling motion to quash	21	13
Demurrer to information	22	13
Order overruling demurrer.....	23	14
Stipulation waiving jury.....	23	14
Arraignment and plea	24	14
Finding by the court	24	14
Order overruling motion for new trial	25	15
Motion in arrest of judgment	25	15
Order overruling motion in arrest of judgment....	27	16
Judgment and sentence ...	28	17
Clerk's certificate	28	17
Order taking case under advisement and granting bail	30	17
Writ of <i>habeas corpus</i>	31	18
Marshal's return	32	18
Bail bond ...	33	19
Opinion	35	20
Order dismissing petition, discharging writ, remanding petitioner, allowing appeal, &c.....	49	26
Petition for appeal	51	27
Assignment of errors.....	52	27
Appeal bond	53	28
Clerk's certificate	55	28
Citation and service ..	56	29

1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United states court-room, in the city of Chicago, in said district and division, before the Hon. John W. Showalter, circuit judge of the United States for the seventh judicial circuit, on Friday, the seventh day of October, being one of the days of the regular July term of said court, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk.*

In the Matter of the Petition of JAMES NICOL for a Writ of *Habeas Corpus*. 24930. Petition.

Be it remembered that on this day, to wit, the thirteenth day of September, 1898, came James Nicol, by his attorney, and filed in the clerk's office of said court his bond for costs and petition for writ of *habeas corpus*; which said bond and petition are respectively in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss :

Circuit Court, October Term, A. D. 1898.

JAMES NICOL
vs.
JOHN C. AMES, as Marshal. } In —

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the petitioner of any costs ordered or adjudged to be paid by him hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against him.

Dated this 13th day of September, A. D. 1898.

HENRY S. ROBBINS,
Residence, 414 N. State St., Chicago.

3 I, Henry S. Robbins, a surety on the annexed bond, being duly sworn, depose and say that I am worth in real estate situate in the northern district of Illinois the sum of four hundred dollars over and above my just debts and liabilities.

HENRY S. ROBBINS.

Sworn to and subscribed before me this 13th day of September, 1898.

GEORGE DAY M. BIRNEY,
Notary Public, Cook County, Illinois.

[SEAL.]

(Endorsed :) Filed Sept. 13, 1898. S. W. Burnham, clerk.

Petition for Writ of Habeas Corpus.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

To the circuit court of the United States for said district and division:

Your petitioner, James Nicol, of the city of Chicago and State of Illinois, complaining, shows that he is unjustly and unlawfully detained and imprisoned by John Ames, United States marshal for the northern district of Illinois, at the city of Chicago and State of Illinois, by virtue of the warrant of commitment, a copy of which is hereto annexed as "Exhibit A;" which order was issued under the following circumstances:

Your petitioner is a citizen of the United States and has been a citizen of the State of Illinois for over twenty-five years, and at the time of the grievances herein complained of had never been in the military or naval services of the United States; that your petitioner has for some years prior to the second day of September, 1898, been a member of the Chicago board of trade, a commercial exchange duly incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859, a copy of which is hereto annexed and made a part hereof as "Exhibit B;" that the objects of such association are declared by its by-laws to be—

"To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

That said association owns and occupies, in the city of Chicago, an exchange building where its members meet daily (except Sundays and holidays), between certain business hours, for the purpose of buying and selling flour, wheat, corn, oats, rye, barley, hay, straw, flaxseed, grass seed, field seed, pork in all its forms, meats, lard, and other food products, and for the transaction of such other business as is incident thereto; that among its members there are some whose business it is to purchase in the country or receive on consignment from persons in the country some or all of the foregoing articles and sell the same upon said board of trade, and there are other members of said association whose business it is to buy upon said exchange some or all of said articles of merchandise, either for themselves or on commission, and to deliver or ship the same to consumers or distributors throughout this country and Europe, and that the sales and contracts for sale of said merchandise so made upon said board of trade are identical in their character with all other sales and contracts for sales of the same kind of merchandise made in the city of Chicago and elsewhere throughout the United

States at other places than on such exchanges, boards of trade, or other similar places.

That on the second day of September, 1898, in the course of his business on the said board of trade your petitioner, by oral contract, sold for immediate delivery, at the city of Chicago, to one James H. Milne, also a member of the said board of trade and a citizen of the State of Illinois, two car-loads of oats, consisting of two thousand two hundred and eighty-nine bushels of oats, then in said city of Chicago,

at a price of twenty and three-quarters cents per bushel, and for the total sum of four hundred and seventy-four dollars and ninety-eight cents, and thereafter, on, to wit, the

6 eighth day of September, 1898, John C. Black, Esquire, as the United States attorney for the northern district of Illinois, presented to and with leave of said court filed in the district court of the United States for the northern district of Illinois, northern division, a certain information and affidavit reciting said sale by your petitioner of said two car-loads of oats, and also reciting that your petitioner had made such sale without then and there making and delivering to said buyer any bill, memorandum, agreement, or other evidence of said sale showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, as required by the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes;" and thereupon said court, upon said petition, ordered a bench warrant to issue against your petitioner, whereon your petitioner was brought into said court, and, said information being read to him, interposed a motion to quash the same upon the ground that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void, but said district court entered an order denying said motion and requiring your petitioner to plead to said information, whereupon your petitioner interposed a demurrer to said information upon the ground that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void, and that for that reason said information did not charge an offense or crime against the laws of the United States, but said court overruled said demurrer, and whereupon your petitioner was arraigned upon said information and thereupon entered his plea of not guilty; and said case having

7 proceeded to trial (a jury having been waived by the Government and this defendant), said court, upon a trial, entered a general finding, finding the defendant guilty as charged in said information; whereupon your petitioner successively entered his motion for a new trial and in arrest of judgment, which were successively overruled, and thereupon said court entered its sentence and judgment of conviction wherein it imposed upon your petitioner a fine of five hundred dollars, and committed your petitioner to the county jail of Cook county, State of Illinois, until the said fine and costs should be paid, but suspending execution of said sentence until 9 o'clock a. m. Monday, September 12, 1898, a copy of which said affidavit, information, motion to quash, demurrer, motions for

a new trial and arrest of judgment, orders, sentence, and judgment of conviction, being the entire record of said case in said court, are annexed hereto and made a part hereof as "Exhibit C."

And thereupon, said order of commitment coming to the hands of said marshal and your petitioner not having paid said fine and costs as therein required, said marshal, after the hour of nine o'clock a. m. on the 12th day of September, 1898, took your petitioner into his custody under said warrant, and now has your petitioner in his custody, and is now in the act of transporting him to said jail specified in said commitment.

And your petitioner claims that he is restrained and deprived of his liberty as above stated unlawfully, and that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void for the following reasons and others:

First. Because it is outside of the power of Congress and exclusively within the legislative power of the several States to prescribe whether contracts made within such States shall be made orally or shall be evidenced by written memoranda.

8 Second. Because the tax in supposed aid of which that part of said act of Congress upon which said information is based was enacted is contrary to the Constitution of the United States, in that it is "not uniform" throughout the United States, being imposed not upon all bills, memoranda, agreements, or other evidences of sales or agreements to sell merchandise or products, but on such only as relate to such sales or agreements to sell when made at an exchange, board of trade, or other similar place, and hence that said information does not charge an offense or crime under or by virtue of the laws of the United States, and that said district court for the northern district of Illinois, northern division, in so trying and committing to jail your petitioner as aforesaid acted wholly without jurisdiction or legal authority so to do, and said order under which your petitioner is held in custody is wholly void.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said John Ames, United States marshal for the northern district of Illinois, may issue at once in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require, and that a writ of certiorari, if necessary, may also be issued to the clerk of the district court for the northern district of Illinois, northern division, commanding him to transmit at once to this court a full, complete, and true transcript of said cause and pleadings wherein your petitioner has been convicted and is detained as aforesaid.

JAMES NICOL.

HENRY S. ROBBINS,
Counsel for Petitioner.

9 UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss :

James Nicol, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true.

JAMES NICOL.

Subscribed and sworn to before me this 13th day of September, 1898.

[SEAL.] WIRT E. HUMPHREY,
*United States Commissioner
 for the Northern District of Illinois.*

EXHIBIT "A."

Copy.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss :

The President of the United States of America to the marshal of the northern district of Illinois, Greeting :

Whereas James Nicol appeared before the district court of the United States for the northern district of Illinois on the eighth day of September, 1898, to answer an information filed herein against him for having on September 2, 1898, with intent to evade certain provisions of the act of Congress of June 13, 1898, known as the war-revenue law of 1898, made a sale of merchandise on the Chicago board of trade to one James H. Milne without making and for having unlawfully failed to make a memorandum of the said sale as required by law aforesaid, and the said James Nicol, upon hearing in due form of law, having been found guilty as charged in the said information and having on that day been sentenced to pay a fine of five hundred dollars and the costs of court and to imprisonment in the county jail of Cook county, Illinois, until the same should be paid (which said sentence the said court directed should not be executed until the twelfth day of September, 1898):

Now, therefore, you are hereby commanded to commit the said James Nicol to the county jail of Cook county, Illinois, to be there safely kept until said fine and costs are paid or he is otherwise discharged by due process of law.

Witness the Hon. Peter S. Grosscup, judge of the district court of the United States of America, at Chicago aforesaid, this 12th [SEAL.] day of September, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123rd year.

T. C. MacMILLAN,
*Clerk United States District Court,
 Northern District of Illinois.*

(Endorsed :) Copy. No. 2944. District court of the United States, northern district of Illinois. The United States vs. James Nicol. Copy. Commitment on sentence. Issued 12th day of September, 1898. T. C. MacMillan, clerk.

"EXHIBIT B." *Exhibit "B."*

Be it enacted by the people of the State of Illinois, represented in the General Assembly :

SEC. 1. That the persons now composing the board of trade of the city of Chicago, are hereby created a body politic and corporate, under the name and style of "The Board of Trade of the City of Chicago" and by that name may sue and be sued, implead
11 and be impleaded, receive and hold property and effects, real and personal, by gift, devise or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the sum of two hundred thousand dollars) may have a common seal, and alter the same from time to time; and make such rules, regulations, and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

SEC. 2. That the rules, regulations and by-laws of the said existing board of trade shall be the rules and by-laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said association known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created, until their respective offices shall regularly expire or be vacated, or until the election of new officers according to the provisions hereof.

SEC. 3. The officers shall consist of a president, one or more vice-presidents, and such other officers as may be determined upon by the rules, regulations, or the by-laws of said corporation. All of said officers shall respectively hold their offices for the length of time fixed upon by the rules and regulations of said corporation hereby created, and until their successors are elected and qualified.

SEC. 4. The said corporation is hereby authorized to establish such rules, regulations and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

SEC. 5. The time and manner of holding elections and
12 making appointments of such officers as are not elected, shall be established by the rules, regulations and by-laws of said corporation.

SEC. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof.

SEC. 7. Said corporation may constitute and appoint committees or reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by

members of the association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses and issue subpoenas and attachments, compelling the attendance of witnesses the same as justices of the peace, and in like manner directed to any constable to execute.

SEC. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the rules or by-laws, then, on filing such award and submission with the clerk of the circuit court, an execution may issue upon such award as if it were a judgment rendered in the circuit court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

SEC. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and from their officers, 13 whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts, and the president or secretary is hereby authorized to administer such oaths of office as may be prescribed in the by-laws or rules of said corporation. Said bonds shall be made payable and conditioned as prescribed by the rules or by-laws of said corporation, and may be sued and the moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

SEC. 10. Said corporation shall have power to appoint one or more persons, as they may see fit, to examine measure, weigh, gauge, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said corporation; and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation or others interested, and requiring or assenting to the employment of such weighers, measurers, gaugers, or inspectors; nothing herein contained, however, shall compel the employment, by any one, of any such appointee.

SEC. 11. Said corporation may inflict fines upon any of its members and collect the same, for breach of its rules, regulations or by-laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation.

SEC. 12. Said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the 14 management of boards of trade or chambers of commerce or as provided in the foregoing sections of this bill.

EXHIBIT "C."

Pleas had at a regular term of the district court of the United States of America for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the first Monday of July, it being the fourth day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third year.

THE UNITED STATES }
vs. } 2944. Vio. Int. Rev. Laws.
 JAMES NICOL. }

Be it remembered that heretofore, to wit, on the 8th day of September, A. D. 1898, it being one of the days of the regular July term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the first Monday of July, it being the fourth day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third year, before the Honorable William H. Seaman, judge of the district court of the United States for the eastern district of Wisconsin, sitting in this court by designation, presiding; John C. Ames, United States marshal for said district, and T. C. MacMillan, clerk of said court, the following order was had and entered of record in said cause, to wit:

15 THE UNITED STATES }
vs. } 2944. Vio. Int. Rev. Laws.
JAMES NICOL. }

Comes John C. Black, Esq., district attorney, and presents an information against James Nicol, the defendant herein, charging the said James Nicol with violating section 25 of the act of Congress of June 13th, 1898, and asks leave of the court to file the same; whereupon it is ordered by the court that said information be filed and the cause placed upon the dockets of this court.

And afterwards, to wit, on the 8th day of September, A. D. 1898, said information was filed, the same being in the words and figures following, to wit:

NORTHERN DISTRICT OF ILLINOIS, {
Northern Division, } set :

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

Be it remembered that John C. Black, attorney of the United States of America for the northern district of Illinois, who for the

said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the division and district aforesaid on this eighth day of September, in this same term, and for the said United States gives the court here to understand and be informed that James Nicol, of the city of Chicago, in the said division and district, on the second day of September, in the year of our Lord eighteen hundred and ninety-eight, at Chicago

16 aforesaid, in the division and district aforesaid, upon a certain board of trade, to wit, the Chicago board of trade, with intent then and there on the part of him, the said James Nicol, to evade the provision in that behalf in the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," unlawfully did make to James H. Milne, of the same city, a certain sale of merchandise for immediate and present delivery at the said city of Chicago—that is to say, two car-loads of oats, consisting of two thousand two hundred and eighty-nine bushels of oats (then in the said city of Chicago), at the price of twenty and three-quarters cents per bushel and for a total sum of four hundred and seventy-four dollars and ninety-eight cents—without then and there making and delivering to the said James H. Milne any bill, memorandum, agreement, or other evidence of the said sale showing the date thereof, the name of the seller, the amount of the said sale, and the matter or thing to which it referred, as required by law; but, on the contrary thereof, unlawfully did refuse, fail, and neglect to make any bill, memorandum, agreement, or other evidence of the said sale showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, as required by law, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States, who prosecutes, as aforesaid, for the said United States, prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said James Nicol, in this behalf to make him answer to the said United States concerning the premises aforesaid.

JOHN C. BLACK,
United States Attorney.

17 (Endorsed:) No. 2944. District court, criminal, N. div.
The United States vs. James Nicol. Information on sec. 25, act June 13, 1898 (int. rev. law). Filed in open court this 8th day of September, A. D. 1898. T. C. MacMillan, clerk. John C. Black, U. S. att'y, N. dist. Ills.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the affidavit of James H. Milne was filed in said court, said affidavit being in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

James H. Milne, being duly sworn, says that on the second day of September, 1898, upon the Chicago board of trade, in the city of Chicago, James Nicol, of the city of Chicago and a member of said board of trade, made to this deponent a certain sale of merchandise for immediate and present delivery at the city of Chicago, to wit, two car-loads of oats, consisting of two thousand two hundred and eighty-nine bushels of oats, then in said city of Chicago, at the price of twenty and three-quarters cents per bushel and for the total sum of four hundred and seventy-four dollars and ninety-eight cents, without then or subsequently delivering to this deponent any bill, memorandum, agreement, or other evidence showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred.

And further deponent sayeth not.

JAMES H. MILNE.

Subscribed and sworn to before me this 7th day of September, 1898.

18 WIRT E. HUMPHREY,
 United States Commissioner for the
 Northern District of Illinois. [SEAL.]

Endorsed: No. 2944. District court, criminal, N. div. The United States vs. James Nicol. Affidavit. Filed in open court this 8th day of September, A. D. 1898. T. C. MacMillan, clerk. John C. Black, U. S. att'y, N. dist. Ills.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable William H. Seaman, judge presiding, to wit:

THE UNITED STATES }
 vs. } 2944. Vio. Int. Rev. Laws.
 JAMES NICOL. }

Comes John C. Black, Esq., district attorney, and on his motion it is ordered by the court that a bench warrant be awarded for James Nicol, the defendant herein.

And afterwards, to wit, on the 8th day of September, A. D. 1898, a bench warrant was issued out of and under the seal of said court directed to the marshal of the northern district of Illinois to serve on the defendant, James Nicol; which said bench warrant is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, ss :

District Court of the United States of America, Northern District
of Illinois.

To the marshal of the northern district of Illinois, Greeting :

We command you to take James Nicol, if he shall be found in
your district, and him safely keep, so that you have his body
19 before our judge of our district court of the United States
for the northern district of Illinois, at Chicago, in the district
aforesaid, forthwith to answer unto the United States of America
in an information pending in said court against him for violating
the internal-revenue laws of the United States ; and have you then
and there this writ, with your return thereon.

Witness the Hon. Peter S. Grosscup, judge of the district court of
the United States of America, at Chicago aforesaid, this 8th day of
September, in the year of our Lord one thousand eight hundred
and ninety-eight, and of our Independence the 123rd year.

T. C. MacMILLAN, *Clerk*. [SEAL.]

Endorsed : No. 2944. District court of the United States, north-
ern district of Illinois. United States of America vs. James Nicol.
Bench warrant, returnable forthwith. T. C. MacMillan, clerk.

And afterwards, to wit, on the 8th day of September, A. D. 1898,
said bench warrant was returned and filed, with the marshal's return
thereon endorsed in the words and figures following, to wit :

I have duly executed this writ within my district by arresting
the within-named defendant, James Nicol, at Chicago, Ills., at ten
o'clock a. m., September 8th, 1898, and took him before the Honor-
able Wm. H. Seaman, judge.

JOHN C. AMES,
U. S. Marshal, Nor. Dist. Ill.,
By GEO. Q. ALLEN, *Deputy.*

Fees : 1 service, \$2.00 ; no mileage (no expense).

Endorsed : Returned and filed this 8th day of Sep., A. D. 1898.
T. C. MacMillan, clerk.

And afterwards, to wit, on the 8th day of September, A. D. 1898,
comes the defendant, by his attorney, and files in said court a mo-
tion to quash the information filed herein, said motion being in the
words and figures following, to wit :

20 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

UNITED STATES }
vs. }
JAMES NICOL. }

And now comes the defendant, James Nicol, by Henry S. Robbins, his attorney (the said Nicol also being present in open court), and moves the court to quash the information filed herein upon the ground that the said information does not charge or set forth a crime against or under the laws of the United States for the reason that that part of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon which said information is based, is unconstitutional and void upon the following (and other) grounds:

First. Because it is beyond the power of Congress and exclusively within the power of the several States to prescribe, as said act undertakes to do, whether contracts made within such States shall be made orally or shall be evidenced by written memoranda.

Second. Because the tax, in aid of which that part of said act of Congress upon which said information is based, was enacted is contrary to the Constitution of the United States, in that it is not uniform throughout the United States because not imposed upon all bills, memoranda, agreements, or other evidences of sales or agreements to sell merchandise, but on such only as relate to such sales or agreements to sell when made at an exchange, board of trade, or other similar place, said Chicago board of trade mentioned in said information being a commercial exchange duly

21 incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859, and owning and occupying in the city of Chicago an exchange building, where its members meet between certain hours every business day for the purpose of buying and selling flour, wheat, corn, rye, oats, barley, hay, straw, flax seed, grass seed, field seeds, pork in all its forms, meats, lard, and other food products, and the sales and contracts for sales of such merchandise so made upon said board of trade being identical in their character with all other sales and contracts for sales of the same kind of merchandise made throughout the United States at other places than such exchanges, boards of trade, and other similar places.

Wherefore the defendant prays that said information may be quashed.

JAMES NICOL,
By HENRY S. ROBBINS,
His Attorney.

Endorsed: No. 2944. U. S. district court. United States vs. James Nicol. Motion to quash. Filed in open court this 8th day of September, A. D. 1898. T. C. MacMillan, clerk. Henry S. Robbins, Home insurance building, Chicago.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable William H. Seaman, judge presiding, to wit:

THE UNITED STATES }
 vs. } 2944. Vio. Int. Rev. Laws.
 JAMES NICOL. }

Come the parties, by their attorneys, and the defendant in his own proper person, and the defendant, by his counsel, moves the court to quash the information filed herein against him; whereupon, after due consideration, it is ordered by the court that the
 22 said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 8th day of September, A. D. 1898, comes the defendant, by his counsel, and files in said court a demurrer to the information filed herein against him, said demurrer being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

UNITED STATES }
 vs. }
 JAMES NICOL. }

And now comes the said James Nicol, by Henry S. Robbins, his attorney, and having heard the said information read, he says that the United States ought not to impeach or implead him, the said James Nicol, by reason of the premises in the said information named and specified, because he says that the said information and the matters therein contained are not sufficient in law, and he need not nor is he obliged by the law of the land to answer thereto, and for ground of demurrer the said defendant avers that that part of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon which said information is based, is unconstitutional and void, and hence said information does not charge an infringement of or crime against the laws of the United States, and this he is ready to verify.

Wherefore, and because of the insufficiency of said information, the said James Nicol prays judgment, and that he may be
 23 dismissed and discharged by the court here of and from the premises above charged upon him in form aforesaid.

HENRY S. ROBBINS,
Attorney for Defendant.

Endorsed: No. 2944. U. S. district court. United States vs. James Nicol. Demurrer. Filed in open court this 8th day of September, A. D. 1898. T. C. McMillan, clerk. Henry S. Robbins, Home insurance building, Chicago.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause before the Honorable William H. Seaman, judge presiding, to wit :

THE UNITED STATES }
 vs. } 2944. Vio. Int. Rev. Laws.
 JAMES NICOL. }

This cause coming on to be heard upon the demurrer of the defendant to the information filed herein against him, come the parties, by their attorneys, and the defendant in his own proper person, and after hearing the arguments of counsel it is ordered by the court that the said demurrer be, and the same is hereby, overruled.

And afterwards, to wit, on the 8th day of September, A. D. 1898, a stipulation waiving a jury was filed in said court, said stipulation being in the words and figures following, to wit :

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

THE UNITED STATES }
 vs. } No. —. Information.
 JAMES NICOL. }

24 The parties plaintiff and defendant in this case hereby consent and stipulate that the same may be tried and determined by the court without the intervention of a jury, and that trial by a jury in this case is expressly waived.

Dated this eighth day of September, A. D. 1898.

JOHN C. BLACK,

United States Attorney.

HENRY S. ROBBINS,

Attorney for Defendant.

Endorsed: No. 2944. U. S. district court for the N. dist. of Ill., N. div. The United States *vs.* James Nicol. Stipulation waiving jury (sec. 649, R. S.). Filed Sept. 8th, A. D. 1898. T. C. MacMillan, clerk. John C. Black, U. S. attorney. — — —, att'y for def't.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause before the Honorable William H. Seaman, judge presiding, to wit :

THE UNITED STATES }
 vs. } 2944. Vio. Int. Rev. Laws.
 JAMES NICOL. }

Come the parties, by their attorneys, and the defendant in his own proper person, and being arraigned upon the information filed herein against him, the defendant pleads not guilty thereto.

And now, it appearing to the court that the parties to this cause have filed with the clerk of this court a stipulation in writing consenting that this cause may be tried and determined by the court

without the intervention of a jury, the court proceeds with the trial thereof.

25 Having heard the evidence by the parties adduced and arguments of counsel, the court, after due consideration, finds the defendant guilty as charged in the information ; whereupon the defendant, by his counsel, moves the court for a new trial of this cause.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause before the Honorable William H. Seaman, judge presiding, to wit :

THE UNITED STATES	} 2944. Vio. Int. Rev. Laws.
vs.	
JAMES NICOL.	

This cause coming on to be heard upon the motion of the defendant for a new trial hereof, come the parties, by their attorneys, and the defendant in his own proper person, and after arguments of counsel and due consideration it is ordered by the court that the said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 8th day of September, A. D. 1898, a motion in arrest of judgment upon the finding herein was filed in said court, said motion being in the words and figures following, to wit :

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

UNITED STATES	}
vs.	
JAMES NICOL.	

26 And now comes James Nicol, by Henry S. Robbins, his attorney, and moves the court in arrest of judgment on the finding herein, and in support of said motion alleges that said information does not charge or set forth a crime against or under the laws of the United States for the reason that that part of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" upon which said information is based is unconstitutional and void upon the following (and other) grounds :

First. Because it is beyond the power of Congress and exclusively within the power of the several States to prescribe, as said act undertakes to do, whether contracts made within such States shall be made orally or shall be evidenced by written memoranda.

Second. Because the tax, in aid of which that part of said act of Congress upon which said information is based was enacted, is contrary to the Constitution of the United States, in that it is not uniform throughout the United States because not imposed upon all

bills, memoranda, agreements, or other evidences of sales or agreements to sell merchandise, but on such only as relate to such sales or agreements to sell when made at an exchange, board of trade, or other similar place, said Chicago board of trade mentioned in said information being a commercial exchange duly incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859, and owning and occupying in the city of Chicago an exchange building where its members meet between certain hours on every business day for the purpose of buying and selling flour, wheat, corn, rye, oats, barley, hay, straw, flax seed, grass seed, field seeds, pork in all its forms, meats, lard, and other food products, and the sales and contracts for sales of such merchandise so made upon said board of trade being identical in their character with all other sales and contracts for sales of the same kind of merchandise made throughout the United States at other places than such exchanges, boards of trade, and other similar places.

Therefore the defendant prays that judgment be not entered on the finding herein.

JAMES NICOL,
By HENRY S. ROBBINS,
His Attorney.

Endorsed: No. 2944. U. S. district court. United States *vs.* James Nicol. Motion in arrest. Filed in open court this 8th day of September, A. D. 1898. T. C. MacMillan, clerk. Henry S. Robbins, Home insurance building, Chicago.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause before the Honorable William H. Seaman, judge presiding, to wit:

THE UNITED STATES }
vs. } 2944. Vio. Int. Rev. Laws.
JAMES NICOL. }

This cause coming on to be heard upon the motion of the defendant in arrest of the judgment of the court herein, come the parties, by their attorneys, and the defendant in his own proper person, and after arguments of counsel and due consideration it is ordered by the court that the said motion be, and the same is hereby, overruled; to which the defendant duly excepted.

And afterwards, to wit, on the 8th day of September, A. D. 1898, the following order was had and entered of record in said cause before the Honorable William H. Seaman, judge presiding, to wit:

28 THE UNITED STATES }
vs. } 2944. Vio. Int. Rev. Laws.
JAMES NICOL. }

Come the parties, by their attorneys, and the defendant in his own proper person to have the sentence and judgment of the court pro-

nounced upon him, he having heretofore, to wit, on the 8th day of September, A. D. 1898, one of the days of this term of this court, been adjudged guilty in due form of law as charged in the information filed herein against him, and being asked by the court if he had anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the findings of guilty so rendered herein, as aforesaid, that the defendant, James Nicol, forfeit and pay to the United States a fine in the sum of five hundred dollars, besides the costs in this behalf expended.

It is further ordered by the court that the said defendant stand committed to the county jail of Cook county, Illinois, until said fine and costs are paid or he is otherwise discharged by law.

For good cause shown, it is ordered by the court that execution of the sentence and judgment herein be, and the same is hereby, suspended until Monday, September 12th, A. D. 1898.

NORTHERN DISTRICT OF ILLINOIS, }
Northern Division. }

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in said court in the case of The United States *vs.* James Nicol, as the same appears from the records and files of said court now remaining in my custody.

29 In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at my office, in Chicago, in
said district, this 9th day of September, A. D. 1898.

T. C. MACMILLAN, *Clerk*,
By C. R. PICKARD,
Deputy Clerk.

(Endorsed :) Filed Sep. 13, 1898. S. W. Burnham, clerk.

30 And on, to wit, the thirteenth day of September, in the July
term of said court, 1898, in the record of proceedings thereof
in said entitled cause, before the Hon. John W. Showalter, circuit
judge, appears the following entry, to wit:

In the Matter of the Petition of JAMES NICOL for a Writ of *Habeas Corpus*. 24930.

Now, on this day, comes the petitioner, by his attorney, and, by leave of court, files his petition herein, and thereupon it is ordered that a writ of *habeas corpus* issue instant, returnable forthwith; and now comes the marshal of this district, by John C. Black, Esq., his attorney, and makes return to said writ by personally bringing said James Nicol before the court and presenting the record of the judgment upon which said detention is based; and now comes on

to be heard the motion of said petitioner to be discharged under said writ, and the said James Nicol being personally present, and also by Henry S. Robbins, Esq., his attorney, and the respondent, John C. Ames, said marshal, being represented by the Hon. John C. Black, United States attorney, and the court having now heard the arguments to conclusion, and not being sufficiently advised in the premises, takes time to consider; and now comes the petitioner, by his said attorney, and enters his motion to be enlarged on bail, and, the court having considered the same, it is ordered that said petitioner, James Nicol, be released on bail in the sum of one thousand dollars, with surety to be approved by the court.

31 On the same day, to wit, the thirteenth day of September, 1898, a writ of *habeas corpus* issued out of the clerk's office of said court, directed to John C. Ames, United States marshal, to execute; which said writ, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

Writ of Habeas Corpus.

Circuit Court of the United States of America, Northern District of Illinois, Northern Division, ss:

The United States of America to John C. Ames, United States marshal, northern district of Illinois, Greeting:

We command you that you do, without excuse or delay, bring or cause to be brought before the circuit court of the United States of America for the northern district of Illinois, now sitting in the court-room of said circuit court, in the city of Chicago, in said district, the body of James Nicol, by whatever name or addition he is known or called, and who is unlawfully detained in your custody, as it is said, together with the day and cause of his caption and detention, then and there to perform and abide such order and direction as our said circuit court shall make in that behalf. Hereof make due return, under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 13th day of [SEAL.] September, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the

32 122nd year.

S. W. BURNHAM, *Clerk.*

Marshal's Return.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of JAMES NICOL for a Writ of *Habeas Corpus.*

Marshal's return to writ.

I, John C. Ames, hereby certify and make return to the writ of *habeas corpus* issued in this case that I am the marshal of the United

States for the northern district of Illinois, and that I now hold the above-named petitioner in my custody as such marshal by virtue of a certain commitment issued by Thomas C. MacMillan, clerk of the district court of the United States for the said district, on this thirteenth day of September, 1898, which is set forth in full in the petition filed in this case, and a copy of which is hereto attached, directing me as such marshal to forthwith commit the said petitioner to the county jail of Cook county, in the said State of Illinois, until a certain fine of five hundred dollars and costs, adjudged against the said James Nicol by the said district court on the second day of September, 1898, should be paid or the said petitioner otherwise discharged by law, a transcript of the record of the proceedings of the said district court in which said warrant was issued attached to the said petition as Exhibit C. Nevertheless I have the body of the said James Nicol now before this honorable court.

JOHN C. AMES,
United States Marshal.

(Endorsed :) Filed Sept. 14, 1898. S. W. Burnham, clerk.

33 On the same day, to wit, the thirteenth day of September, 1898, came James Nicol, as principal, and Henry S. Robbins, as surety, and filed in the clerk's office of said court a bail bond; which said bail bond is in the words and figures following, to wit:

Bail Bond.

Know all men by these presents that we, James Nicol, as principal, and Henry S. Robbins, as surety, are held and firmly bound unto the United States of America in the sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this thirteenth day of September, A. D. 1898.

The condition of this obligation is such that whereas, on the said thirteenth day of September, A. D. 1898, in pursuance of the prayer of a petition of the said James Nicol, filed in the circuit court of the United States of America for the northern division of the northern district of Illinois, a writ of *habeas corpus* was issued by order of the Hon. John W. Showalter, judge of the said court, directed to John C. Ames, marshal of the said United States for the district aforesaid, and commanding him to have the body of the said James Nicol (then in custody of the said marshal by virtue of a certain mittimus theretofore issued upon a sentence and judgment of the district court of the said United States for the same division and district) before the said circuit court, and the said James Nicol was thereupon brought before the said judge, and such proceedings were had as that the said James Nicol was ordered admitted to bail in the sum of one thousand dollars pending the hearing on the said petition: Now, if the said James Nicol shall personally be and appear before the said circuit court from day to day here-

after until the determination of the said hearing, and shall not depart that court without leave thereof, and shall, in case the said court shall refuse to discharge him in pursuance of the said petition and remand him to the custody of the said marshal, surrender himself to the said marshal to be further dealt with in pursuance of the said mittimus, then this obligation shall be void, and otherwise shall remain in full force.

JAMES NICOL.
HENRY S. ROBBINS. [SEAL.]

Approved this 13th day of September, 1898.

JOHN W. SHOWALTER, *Judge*.

(Endorsed :) Filed Sep. 13, 1898. S. W. Burnham, clerk.

35 Afterwards, to wit, on the 28th day of September, 1898, there was filed in the clerk's office of said court a certain opinion by Judge Showalter; which said opinion is in the words and figures following, to wit:

United States Circuit Court, Northern District of Illinois, Northern Division.

JAMES NICOL	}	Petition for the Writ of <i>Habeas Corpus</i> .
v.		
JOHN AMES, Marshal, etc.		

SHOWALTER, *Circuit Judge*:

The first paragraph of section 6 of the revenue law of 1898 reads:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Of the Schedule A of the act the second paragraph reads:

"Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for
36 each one hundred dollars in value of said sale, or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: Provided, that on every sale or agreement of sale, or agreement to sell, as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, or agree-

ment, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps, in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, or agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof, as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamp affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court."

The petitioner, James Nicol, who is a citizen of Illinois and resides in Chicago, is a member of the commercial exchange known as the Board of Trade of the City of Chicago. On the second day of September, 1898, in the course of his business on said board of trade, Mr. Nicol, by oral contract, sold, for immediate delivery at the city of Chicago, to one James H. Milne, also a member of the said board of trade and a citizen of the State of Illinois, two car-loads of oats, being 2,289 bushels of oats, then in Chicago, at the price of twenty and three-quarters (20 $\frac{3}{4}$) cents per bushel and for the

37 total sum of \$474.98. Thereafter and on the 8th day of September, 1898, the attorney of the United States for the northern district of Illinois filed an information in the district court of the United States for said district reciting said sale, and reciting also that said petitioner had made the sale without making and delivering to the buyer any bill, memorandum, agreement, or other evidence of said sale showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, as required by the statute last above quoted. Proceedings were afterwards had in said court, pursuant to said information, resulting in the conviction of said Nicol and the imposition upon him of a fine of five hundred dollars. Refusing to pay such fine and being in custody, he filed his petition in this court for a writ of *habeas corpus*, and he is brought here by the marshal in response to said writ. He insists that the statute of the United States upon which he was convicted, being that above quoted, is in violation of the national Constitution; that his detention is therefore unlawful, and that he should be discharged from the same.

38 A tax on a sale may mean a revenue charge or imposition by the Government on the liberty of alienation in general or on the liberty of making a sale under special and exceptional conditions. The statute provides that there shall be paid as a tax "upon each sale, agreement of sale, or agreement to sell, any pro-

ducts or merchandise at any exchange, or board of trade, or other similar place * * * for each one hundred dollars in value of said sale, or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent." The sale referred to in this statute, being a sale of products or merchandise, must be made on an "exchange or board of trade" or at a "similar place," and the seller operating for the time being at such place or market must pay the tax. Dominion over the means of making a transfer or sale on a market which is known and established and provided with special safeguards and in a sense exclusive, rather than dominion over the thing sold for the mere purpose of alienation in general, is the subject-matter of the tax. The privilege of selling upon an exchange or board of trade may be thought of as distinct from

39 the product or merchandise there sold or from a sale—merely as a sale—there made. This privilege is itself a property or thing of value, and it is upon the privilege of selling "at any exchange or board of trade" whenever such privilege is made use of, and not upon the sale apart from the privilege, or upon the occupation or business of selling apart from the privilege, or upon the product sold, or upon the price received for it, that the tax is levied. This tax is paid by means of a stamp or stamps put on a written document required by the law to identify each transaction and to receive said stamp or stamps. The document is merely an instrumentality for collecting the tax. The tax, as said, is not in reality and legal effect upon the document, or upon the commodity sold, or upon the sale *per se*, or upon the occupation of selling, but upon the privilege of selling products or merchandise at an exchange or upon a board of trade, for, apart from this privilege, there is in the particular law here complained of no tax.

The privilege in question is taxed according to the use made of it. The tax is graduated in proportion to the magnitude of the deal or operation. On every occasion when the privilege is used

40 the owner thereof, himself conducting the sale, pays the tax.

If he sell for some one not a member of the exchange or board of trade he will still pay the tax, even though he collect the amount, or some portion of it, from his patron as a charge incidental to the service rendered, for while the privilege taxed is his own property, the patron or employer enjoys to some extent the benefit resulting from the use of the privilege, but this tax amounts in reality to an expense in transferring commodities from the producer to the ultimate consumer. The latter, in the last analysis, foots the bill; the tax is absorbed in the ultimate cost and the consumer eventually pays it. Therefore this tax, being a case of what may be called indirect taxation, is, as contended by petitioner, subject to the constitutional limitation of uniformity "throughout the United States," but this tax, in my judgment, falls within the rule of uniformity. That rule is met if a tax operates equally upon the specified subject-matter wherever and whenever found throughout the United States. It is for the law-making power to determine

the incidence of taxation—that is, upon what matters the tax shall be levied—as well as to provide the means or instrumentalities whereby the tax shall be collected. The tax in question applies whenever and wherever throughout the United States the privilege of selling products or merchandise on an exchange or board of trade or similar place is exercised, and it is graduated, as said, according to the use made of the privilege. That such a privilege is taxable seems to me plainly the teaching of the text books on taxation, nor do I understand that this proposition is or will be disputed by the learned counsel for this petitioner.

The point is urged that the method of collecting this tax is unconstitutional and in excess of the power of the national legislature, the reason given being that the law of the State on a matter within the exclusive cognizance of the State is violated—that is to say, the enactment complained of makes unlawful, it is said, an oral contract made in the course of intrastate as distinguished from interstate commerce. The offence for which this petitioner was fined was the neglect to make the memorandum specified in the statute. The sale of the oats by him was oral. He made no note

or memorandum, as required. But the act does not expressly declare that the oral contract in such case shall be deemed unlawful and void, nor is it a question here whether this result follows as a legal consequence from what is declared. If, as is contended, Congress has not the power to make void the oral contract, then that contract is valid. Voidness or illegality in the oral contract itself is in that case no part of the penalty, but the fine for neglecting to make the note or memorandum remains. On this understanding the State law is not interfered with; the rights and liabilities of the parties by virtue of the oral contract remain, from the standpoint of the State law, precisely what they would have been if this national revenue enactment had not been made. On the other hand, if the power to make the oral contract void be in Congress, then the proposition that the oral contract is void as the necessary legal consequence of the neglect to make a written memorandum, as required in this law, would mean that said requirement is constitutional and valid.

The question here is not whether Congress had the power to make the oral contract void, but whether as a means or instrumentality for the collection of a valid tax that body could, under penalty of a fine, require the seller to identify the transaction by making a note of it and to pay the tax by stamping the note so made. The note indicated in the enactment calls for no details of the contract. The note, apparently, need not be subscribed. It need not show the name of the buyer or the time or times of payment, nor need it contain covenants of any kind, or recitals beyond a date, a name, "the amount of the sale and the matter or thing to which it refers." Nor, apart from the interest which the Government may have in enforcing the penalty for violating the revenue law, is the note necessarily subject to the inspection of any person other than the seller who makes and stamps it and the buyer to whom it is delivered. The writing required is merely such a tran-

sient memorial as will meet the purposes of the revenue. If on the occasion of each sale made in the exercise of the privilege of selling on an exchange or board of trade the seller will make, duly stamp, and deliver to the buyer this memorial, then the portion of the national revenue provided for in this law will be collected, and no results beyond this, hurtful or otherwise, will necessarily follow.

44 The memorandum, since it merely identifies the use of the privilege taxed, and receives the stamp which pays the tax, would seem to be appropriate as a means or instrumentality for collecting the tax. Whether entirely adequate or not, the means proposed, including the fine for not making or stamping the memorandum, are not invalid, nor is the tax itself invalid, simply because no other means, such as suit or action of some sort by some revenue officer beyond the mere sale of stamps, were provided.

Section 8 of article I of the national Constitution is an enumeration of powers vested in the Congress of the United States. The first in the list is the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." The tax here in question is obviously not a direct tax, to be apportioned among the States within the sense of paragraph 3 of section 2 or paragraph 4 of section 9 of said article I. Aside from the words "to pay the debts and provide for the common defense and general

45 welfare of the United States," upon which no point is made in the argument, the rule of uniformity is the only limitation upon the power of Congress to levy this tax. Counsel argues that this is in reality a tax on documents; that the memorandum called for in this act touching a sale on a board of trade or an exchange cannot be different in classification from such a memorandum touching a sale made elsewhere, and upon this ground he contends that the rule of uniformity is violated. He says, moreover, that petitioner was fined not for failing to affix a stamp to a document already extant, but for refusing to make the document, and besides the rule of uniformity he appeals to another rule, namely, that a tax can be levied only upon existing subjects, and that Congress cannot make it obligatory on the tax-payer to create or produce subjects merely that they may be taxed; but I do not concur with him in the view that this is a tax on documents. The document is made in order that it may receive the stamp; but the stamp does not pay a tax on the document. The document is merely the convenient instrumentality whereby the tax may be collected. After the enumeration in section 8 successively of various powers

vested in the Congress of the United States there follows
46 this power: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Upon levying this tax it was for Congress to select the means which that body deemed "necessary and proper" for collecting the same. Even if in some enactment for carrying into effect a power clearly

given by the Constitution of the United States Congress should ignore or annul an existing State law, this would not make such enactment invalid, provided the means proposed therein were "necessary and proper," as recited in the constitutional provision last above quoted; but the particular statute here in question and upon which this petitioner was convicted does not, as explained above, necessarily interfere with any State law. Defining the words "necessary and proper," Chief Justice Marshall, in *McCullough v. State of Maryland*, 4 Wheaton, 316, 420, 421, said:

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended; but we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers which it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

I think the tax here in question is not in violation of the rule of uniformity, and that the provision here complained of, considered as a means for collecting the tax, was appropriate and plainly adapted to that end, and that such a means is not prohibited by the Constitution or inconsistent with the letter and spirit of that instrument.

It has been said in the course of this opinion that this is a case of indirect taxation, being an excise tax within the meaning of the words "but all duties, imposts, and excises shall be uniform throughout the United States." The income-tax decision, *Pollock v. Farmers' Loan & Trust Company*, 158 U. S., 617, 635, 637, went on the distinction between direct and indirect taxation. The Chief Justice, in delivering the opinion of the court, said:

"We have considered the act only in respect of the tax on income derived from real estate and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."

And, again, "We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property or the income thereof might not also lay excise taxes on business, privileges, employments, and vocations," meaning, as I understand, that such taxes are to be deemed indirect—that is to say, not subject to the rule of apportionment, but only to that of uniformity.

The writ of *habeas corpus* is discharged and the petitioner remanded to the custody of the marshal.

(Endorsed :) Filed Sep. 28, 1898. S. W. Burnham, clerk.

49 Afterwards, to wit, on the seventh day of October, in the July term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit:

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of JAMES NICOL for *Habeas Corpus*.

This cause coming on for a final hearing upon the petition herein and return of the respondent hereto, and the court having heard the argument of counsel and being fully advised in the premises, the court finds and adjudged that the commitment and imprisonment of the petitioner under the warrant of *habeas corpus* in this case are sufficient cause and return in law for his detention by said marshal; therefore—

It is ordered by the court that the writ of *habeas corpus* allowed in this case be dismissed, and that the prisoner be remanded and continued in the custody of such marshal under such his arrest and commitment by the aforesaid process referred to in the return of said marshal, and that the respondent have and recover from the petitioner herein the costs by him incurred in this matter; to which the petitioner duly excepts.

Thereupon said petitioner, James Nicol, having presented to and filed in said court his assignments of errors and petition for appeal from this order to the Supreme Court of the United States—

It is further ordered that said appeal be allowed upon said petitioner's filing his appeal bond in the penal sum of three hundred dollars, to be approved by this court.

It is further ordered that upon said Nicol filing his appeal bond as aforesaid the order or judgment appealed from herein be, and the same is hereby, superceded until the final decision of the Supreme Court upon said appeal, and the said James Nicol be not taken into custody upon his filing in this court a recognizance and bail
50 bond, with surety, in the sum of one thousand dollars, conditioned for his appearance to answer the judgment of said Supreme Court upon said appeal.

Thereupon the said James Nicol presents in open court his appeal bond, and it is ordered that the same stand approved, and that the clerk of this court send up to the October term, A. D. 1898, of the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings to such cause.

51 On the same day, to wit, on the seventh day of October, 1898, came James Nicol, by his attorney, and filed in the clerk's office of said court his petition for appeal; which said petition for appeal is in the words and figures following, to wit:

Petition for Appeal.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of JAMES NICOL for *Habeas Corpus*.

And now comes the petitioner, James Nicol, and deeming himself aggrieved by the judgment or order of this court entered the seventh day of October, 1898, herewith presents his assignments of errors and prays that an appeal may be allowed from said order to the Supreme Court of the United States, and that a transcript of the records and proceedings upon which said judgment was made may be sent, duly authenticated, to the Supreme Court of the United States.

JAMES NICOL,
By HENRY S. ROBBINS,
His Attorney.

(Endorsed :) Filed Oct. 7, 1898. S. W. Burnham, clerk.

On the same day, to wit, the seventh day of October, 1898, came James Nicol, by his attorney, and filed in the clerk's office of said court his assignments of error; which assignments of error are in words and figures following, to wit:

52 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of JAMES NICOL for *Habeas Corpus*.

And now comes the petitioner, James Nicol, and, for the purpose of appeal from the order entered herein to the Supreme Court of the United States, hereby assigns the following errors upon the record of this cause:

First. That the circuit court erred in dismissing the petition and writ of *habeas corpus* and remanding the petitioner to the custody of the marshal.

Second. That the circuit court erred in not sustaining said petition and discharging said petitioner from arrest.

Third. That the circuit court erred in not holding that part of the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon which said petitioner was convicted, unconstitutional, and in not adjudging said petitioner, by reason thereof, entitled to his discharge.

Wherefore said petitioner prays that said decree, judgment, or order may be reversed and said circuit court be directed to enter an order discharging said petitioner.

JAMES NICOL,
By HENRY S. ROBBINS,
His Attorney.

53 On the same day, to wit, the seventh day of October, 1898, came James Nicol, as principal, and *and* Henry S. Robbins, as surety, and filed in the clerk's office of said court an appeal bond; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, James Nicol, as principal, and Henry S. Robbins, as *sureties*, are held and firmly bound unto the United States of America in the full and just sum of three hundred dollars, to be paid to the said The United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a circuit court of the United States of America for the northern district of Illinois, in a suit depending — said court, *between* in the matter of the petition of James Nicol for a writ of *habeas corpus*, a judgment was rendered against the said James Nicol dismissing the writ of *habeas corpus* theretofore issued therein, and the said James Nicol having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 5 days from the date thereof:

Now, the condition of the above obligation is such that if the said James Nicol shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good,
54 then the above obligation to be void; else to remain in full force and virtue.

JAMES NICOL. [SEAL.]
HENRY S. ROBBINS. [SEAL.]

Approved by—
— — —

(Endorsed:) Filed Oct. 7, 1898. S. W. Burnham, clerk.

55 NORTHERN DISTRICT OF ILLINOIS, { ss:
Northern Division,

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had in said court in the matter of the petition of James Nicol for writ of *habeas corpus* as the same appear from the original records and files of said court now remaining in my custody and control.

Seal of Circuit Court
U.S., Northern Dist.
Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this eighth day of October, 1898.

S. W. BURNHAM, Clerk.

56 UNITED STATES OF AMERICA, ss :

To the United States of America, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 5 days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein James Nicol, the petitioner, is appellant and The United States of America, respondent, is the appellee, to show cause, if any there be, why the judgment rendered against the said appellant in error, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Showalter, circuit judge, this seventh day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

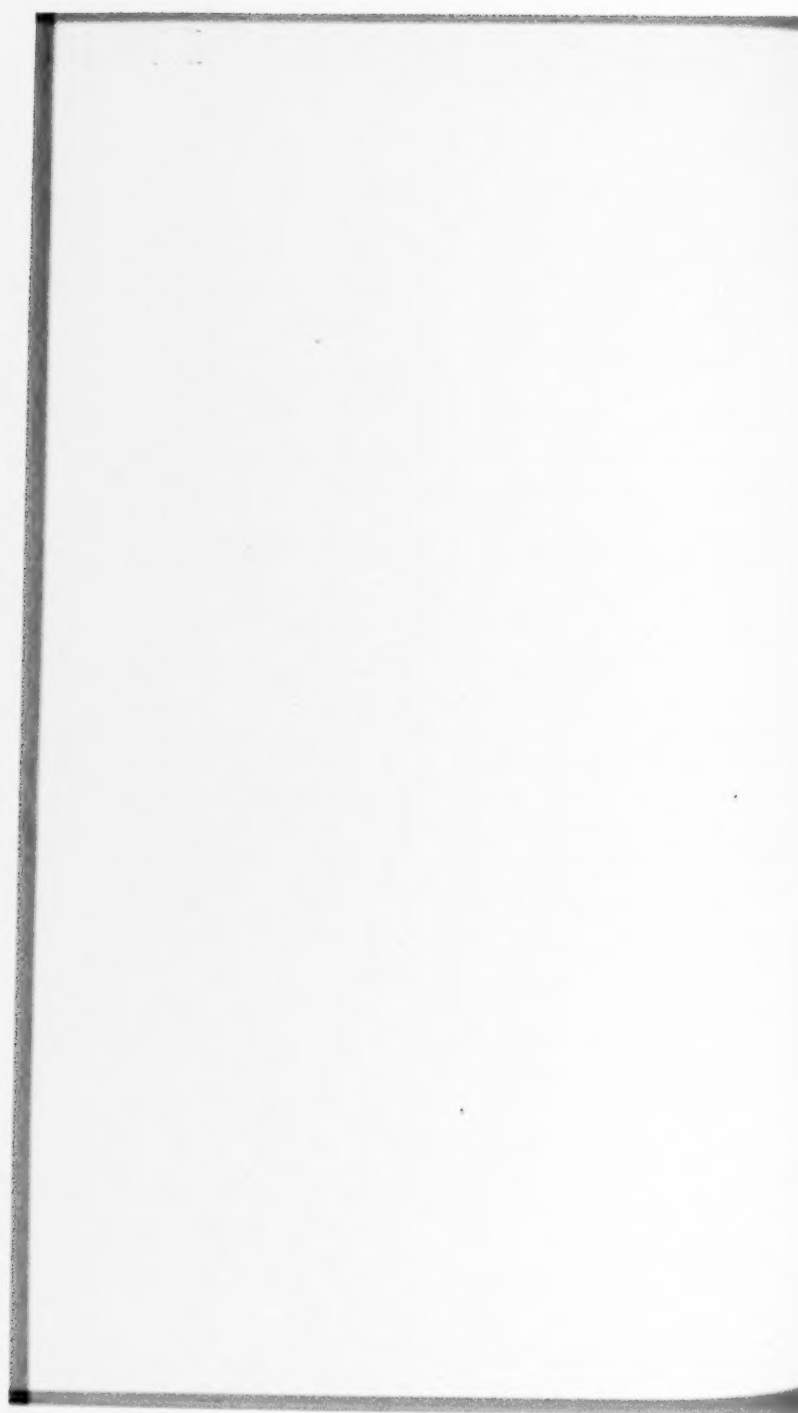
JOHN W. SHOWALTER,
Circuit Judge, U. S. Circuit Court, Northern District Ills.

Filed Oct. 8, 1898.

S. W. BURNHAM, *Clerk.*

57 [Endorsed:] Rec'd Chicago, Oct. 8, 1898, at 11.20 o'clock a. m.
John C. Black, U. S. att'y, N. D. Ills.

Endorsed on cover: Case No. 17,020. N. Illinois C. C. U. S. Term No., 435. James Nicol, appellant, vs. John Ames, United States marshal for the northern district of Illinois. Filed October 12th, 1898.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 625.

EDWIN S. SKILLEN, APPELLANT.

vs.

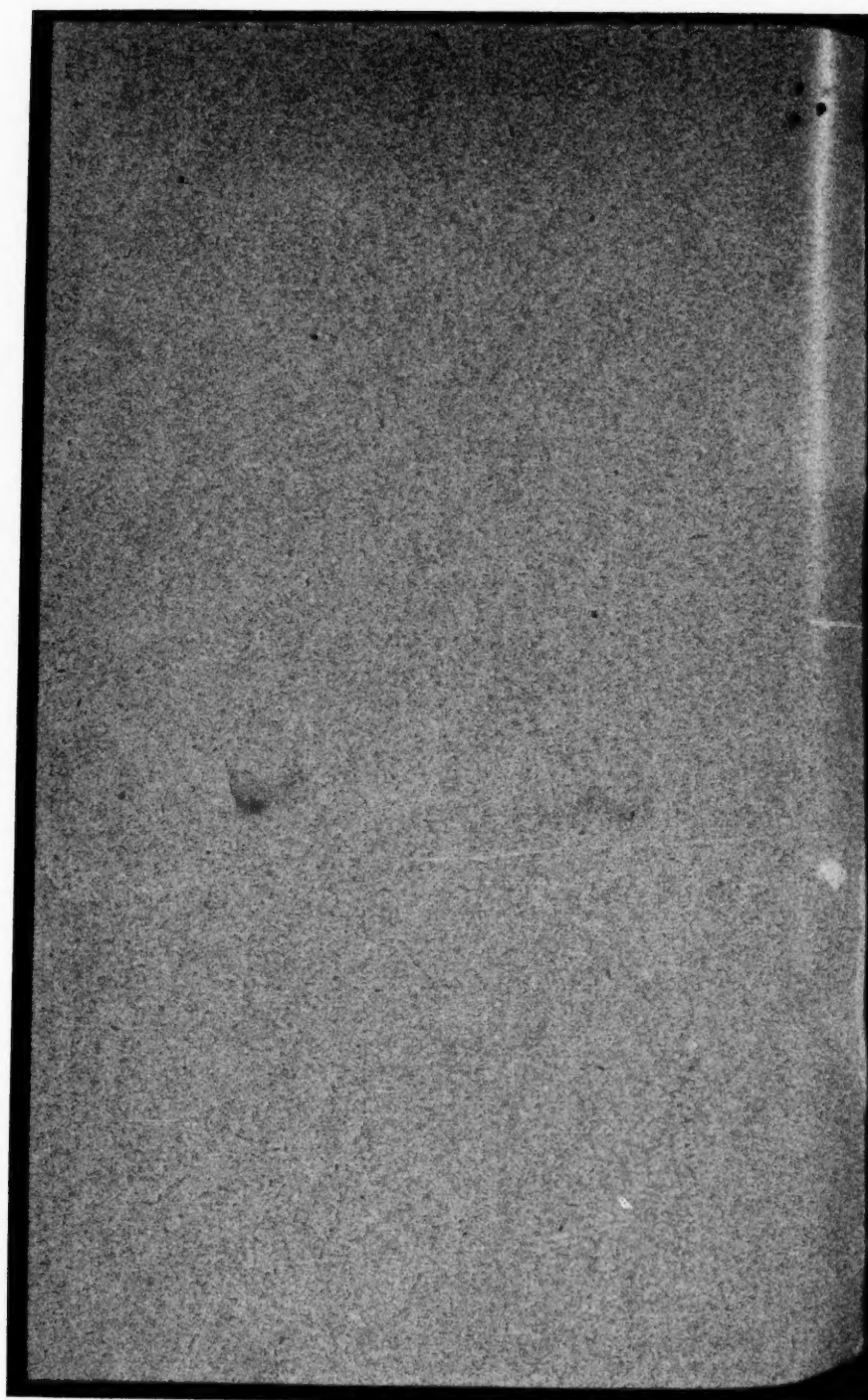
JOHN C. AMES, UNITED STATES MARSHAL FOR THE
NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 6, 1905.

(17,210.)

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(17,210.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 625.

EDWIN S. SKILLEN, APPELLANT,

*vs.*JOHN C. AMES, UNITED STATES MARSHAL FOR THE
NORTHERN DISTRICT OF ILLINOIS.APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs ..	2	1
Petition for writ of <i>habeas corpus</i>	3	2
Exhibit A—Commitment	9	5
B—Record in case of U. S. vs. Skillen.....	11	6
Order filing information.....	12	6
Information	13	7
Affidavit of Frank Harlow.....	16	8
Order for bench warrant	18	9
Bench warrant and return.....	18	10
Motion to quash.....	20	11
Order overruling motion to quash.....	21	11
Demurrer	22	12
Order overruling demurrer.....	23	12
Trial and verdict.....	24	13
Order overruling motion for new trial.....	25	13
Motion in arrest of judgment.....	26	13
Order overruling motion in arrest of judgment....	27	14
Judgment and sentence.....	27	14
Clerk's certificate.....	28	15

	Original.	Print.
Order taking petition under advisement and enlarging petitioner on bail	29	15
Writ of <i>habeas corpus</i>	30	16
Marshal's return	31	16
Bail bond	32	17
Order dismissing petition, &c.	35	18
Order allowing appeal, &c.	35	18
Petition for appeal	37	19
Assignment of errors	37	19
Appeal bond	39	20
Citation	40	21
Acceptance of service of citation	41	21
Clerk's certificate	42	21

1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United States court-room, in the city of Chicago, in said district and division, before the Honorable William H. Seaman, district judge of the United States for the eastern district of Wisconsin, by assignment sitting as circuit judge for the northern district of Illinois, on Saturday, the third day of December, being one of the days of the regular July term of said court, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk*.

Petition.

In the Matter — the Petition of EDWIN S. SKILLEN for Writ of *Habeas Corpus*. 25008.

Be it remembered that on this day, to wit, the third day of December, 1898, came Edwin S. Skillen, by his attorney, and filed in the clerk's office of said court his bond for costs and petition for writ of *habeas corpus*; which said bond and petition are respectively in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

Circuit Court, October Term, A. D. 1898.

EDWIN S. SKILLEN
vs.
JOHN C. AMES, as Marshal. } In —.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the petitioner of any costs ordered or adjudged to be paid by him hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against him.

Dated this 3rd day of December, A. D. 1898.

HENRY S. ROBBINS,
Residence, 414 N. State St., Chicago.

I, Henry S. Robbins, a surety on the annexed bond, being duly sworn, depose and say that I am worth in real estate situate in the northern district of Illinois the sum of four hundred dollars over and above my just debts and liabilities.

HENRY S. ROBBINS.

Sworn to and subscribed before me this 3rd day of December,
A. D. 1898.

[SEAL.]

GEORGE DAY McBIRNEY,
Notary Public.

3

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division,

To the circuit court of the United States for said district and division:

Your petitioner, Edwin S. Skillen, of the city of Chicago and State of Illinois, complaining, shows that he is unjustly and unlawfully detained and imprisoned by John Ames, United States marshal for the northern district of Illinois, at the city of Chicago and State of Illinois, by virtue of the warrant of commitment, a copy of which is hereto annexed as "Exhibit A;" which order was issued under the following circumstances:

Your petitioner is a citizen of the United States and has been a citizen of the State of Illinois for over thirteen years, and at the time of the grievances herein complained of had never been in the military or naval services of the United States; that your petitioner has, for some years prior to the second day of November, 1898, been a member of the Chicago board of trade, a commercial exchange duly incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859.

That said association owns and occupies in the city of Chicago an exchange building, where its members meet daily (except Sundays and holidays), between certain business hours, for the purpose of buying and selling flour, wheat, corn, oats, rye, barley, hay, straw, flaxseed, grass seed, field seed, pork in all its forms, meats, lard, and other food products, and for the transaction of such other business as is incident thereto; that among its members there are some whose business it is to purchase in the country or receive on consignment from persons in the country some or all of the foregoing articles and sell the same upon said board of trade, and there are other members of said association whose business it is to buy upon said exchange some or all of said articles of merchandise either for themselves or on commission and to deliver or ship the same to consumers or distributors throughout this country and Europe, and that the sales and contracts for sales of said merchandise so made upon said board of trade are identical in their character with all other sales and contracts for sales of the same kind of merchandise so made in the city of Chicago and elsewhere throughout the United States and other places than on such exchanges, boards of trade, or other similar places.

That on the second day of November, 1898, in the course of his business on said board of trade, your petitioner made a certain oral agreement with Frank Harlow, also a citizen of Illinois and a member of said board of trade, to sell to his firm of F. Harlow & Company five thousand bushels of corn at thirty-two cents per bushel, or \$1,600, to be delivered on any day in the month of December

next that your petitioner should select, and that thereafter, on the 25th day of November, 1898, said F. Harlow & Company agreed to sell your petitioner a like five thousand bushels of corn, at thirty-three cents per bushel, to be delivered on any day in the month of December next that said Harlow & Company should select, and that thereafter, as is the general custom in such cases on the Chicago board of trade, the two said sales were offset and settled by the payment by your petitioner to said Harlow & Company of the sum of fifty dollars, being the difference between said price at which your petitioner had sold and the price at which he had bought back said corn, your petitioner never having owned or had the corn referred to in said agreement to sell nor any corn applicable to or for the purpose of delivery under your petitioner's said agreement, to sell, and thereafter, on, to wit, the second

5 day of December, 1898, John C. Black, Esquire, as the United States attorney for the northern district of Illinois, presented to and with leave of said court filed in the district court of the United States for the northern district of Illinois, northern division, a certain information and affidavit reciting said agreement by your petitioner to sell five thousand bushels of corn, and also reciting that your petitioner had made such agreement to sell without then and there making and delivering to said buyer any bill, memorandum, agreement, or other evidence of said agreement to sell, showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, as required by the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes;" and thereupon said court upon said petition ordered a bench warrant to issue against your petitioner, whereon your petitioner was brought into said court, and said information being read to him interposed a motion to quash the same upon the ground that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void, but said district court entered an order denying said motion and requiring your petitioner to plead to said information; whereupon your petitioner interposed a demurrer to said information upon the ground that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void, and that for that reason said information did not charge an offense or crime against the laws of the United States; but said court overruled said demurrer, and whereupon your petitioner was arraigned upon said information and thereupon entered his plea of

6 not guilty, and said case having proceeded to trial, and a jury having been empanelled, a verdict was rendered by it finding the defendant guilty as charged in said information; whereupon your petitioner successively entered his motion for a new trial and in arrest of judgment, which were successively overruled; and thereupon said court entered its sentence and judgment of conviction, wherein it imposed upon your petitioner a fine of five hundred dollars, and committed your petitioner to the county jail of Cook county, State of Illinois, until said fine and costs should be

paid, but suspending execution of said sentence until December 3rd, 1898, at 9 o'clock a. m., a copy of which said affidavit, information, motion to quash, demurrer, motions for a new trial and in arrest of judgment, orders, sentence, and judgment of conviction, being the entire record of said case in said court, are annexed hereto and made a part hereof as "Exhibit B."

And thereupon said order of commitment coming to the hands of said marshal, and your petitioner not having paid said fine and costs as therein required, said marshal, after the hour of 9 o'clock a. m. on the 3rd day of December, 1898, took your petitioner into his custody under said warrant and now has your petitioner in his custody and is now in the act of transporting him to said jail specified in said commitment.

And your petitioner claims that he is restrained and deprived of his liberty, as above stated, unlawfully, and that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void for the following reasons and others:

First. Because it is outside of the power of Congress and exclusively within the legislative power of the several States to
7 prescribe whether contracts made within such States shall be made orally or shall be evidenced by written memoranda.

Second. Because the tax in supposed aid of which that part of said act of Congress upon which said information is based was enacted is contrary to the Constitution of the United States, in that it is not uniform throughout the United States, and hence said information does not charge an offense or crime under or by virtue of the laws of the United States, and that said district court for the northern district of Illinois, northern division, in so trying and committing to jail your petitioner, as aforesaid, acted wholly without jurisdiction or legal authority so to do, and said order under which your petitioner is held in custody is wholly void.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said John Ames, United States marshal for the northern district of Illinois, may issue at once in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require, and that a writ of certiorari, if necessary, may also be issued to the clerk of the district court for the northern district of Illinois, northern division, commanding him to transmit at once to this court a full, complete, and true transcript of said cause and pleadings wherein your petitioner has been convicted and is detained, as aforesaid.

EDWIN S. SKILLEN.

HENRY S. ROBBINS,
Counsel for Petitioner.

8 UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

Edwin S. Skillen, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him;

that he has read the same and knows the contents thereof, and that the statements therein made are true.

EDWIN S. SKILLEN.

Subscribed and sworn to before me this 3rd day of December, A. D. 1898.

[SEAL.]

WIRT E. HUMPHREY,
*United States Commissioner for
Northern District of Illinois.*

9

"EXHIBIT A."

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss.:

The President of the United States of America to the marshal of the northern district of Illinois, Greeting:

Whereas Edwin S. Skillen appeared before the district court of the United States for the northern district of Illinois on the second day of December, 1898, to answer an information filed herein against him for having on November 2nd, 1898, with intent to evade certain provisions of the act of Congress of June 13, 1898, known as the war revenue law of 1898, made a sale of merchandise on the Chicago board of trade to one Frank Harlow without making and for having unlawfully failed to make a memorandum of the said sale as required by law aforesaid, and the said Edwin S. Skillen, upon hearing in due form of law, having been found guilty as charged in the said information, and having on that day been sentenced to pay a fine of five hundred dollars and the costs of court and to imprisonment in the county jail of Cook county, Illinois, until the same should be paid (which said sentence the said court directed should not be executed until the 3rd day of December, 1898):

Now, therefore, you are hereby commanded to commit the said Edwin S. Skillen to the county jail of Cook county, Illinois, to be there safely kept until said fine and costs are paid, or he is otherwise discharged by due process of law.

Witness the Hon. Peter S. Grosscup, judge of the district court of the United States of America, at Chicago aforesaid, this [SEAL.] 2nd day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123rd year.

T. C. MacMILLAN,
*Clerk United States District Court,
Northern District of Illinois.*

10 NORTHERN DISTRICT OF ILLINOIS, }
Northern Division, } ss.:

I, T. C. MacMillan, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the commitment

issued our of and under the seal of said court on the 2nd day of December, A. D. 1898, in the cause wherein The United States of America is the plaintiff and Edwin S. Skillen the defendant, as the same appears from the original now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at my office in Chicago, in said district, this 3rd day of December, A. D. 1898.

T. C. MACMILLAN, *Clerk*,
By C. R. PICKARD,
Deputy Clerk.

11

EXHIBIT B.

Pleas had at a regular term of the district court of the United States of America for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the 1st Monday of July, it being the 4th day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third year.

12

THE UNITED STATES	}	Vio. Int. Rev. Laws.
vs.		
EDWIN S. SKILLEN.		

Be it remembered that heretofore, to wit, on the second day of December, A. D. 1898, it being one of the days of the July term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the 1st Monday of July, it being the 4th day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third year, before the Honorable Peter S. Grosscup, judge of said court, presiding; John C. Ames, United States marshal for said district, and T. C. MacMillan, clerk of said court, the following order was had and entered of record in said cause, to wit:

THE UNITED STATES	}	2987. Vio. Int. Rev. Laws.
vs.		
EDWIN S. SKILLEN.		

Comes John C. Black, Esq., district attorney, and presents an information against Edwin S. Skillen, the defendant herein, charging the said Edwin S. Skillen with violating section 25 of the act of Congress of June 13, 1898, and asks leave of the court to file the same; whereupon it is ordered by the court that said information be filed and the cause placed upon the dockets of this court.

And afterwards, to wit, on the second day of December, A. D. 1898, said information was filed, the same being in the words and figures following, to wit:

- 13 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the October Adjourned Term, in the Year Eighteen Hundred and Ninety-eight.

NORTHERN DISTRICT OF ILLINOIS, }
Northern Division, } *set*:

Be it remembered that John C. Black, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the division and district aforesaid, on this second day of December, in this same term, and for the said United States gives the court here to understand and be informed that Edwin S. Skillen, late of the city of Chicago, in the said division and district, on the second day of November, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, upon the Chicago board of trade, with intent then and there on the part of him, the said Edwin S. Skillen, to evade the provisions in that behalf in the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," did make with one Frank Harlow, of the same city, and of the firm of F. Harlow & Company, a certain agreement to sell to him, the said F. Harlow & Company, for delivery during the then ensuing month of December, on such day thereof as the said Edwin S. Skillen should select, five thousand bushels of corn, at a price of thirty-two cents per bushel, and for a total sum of sixteen hundred dollars, without there and then, to wit, at the time of the making of the said agreement, or afterwards, making and delivering to the said Frank

- 14 Harlow or to the said F. Harlow & Company any bill, memorandum, or other evidence of said agreement, showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, as required by law, and without then or thereafter owning or having in his possession the corn referred to in said agreement or any corn applicable thereto or for the purpose of delivery thereon, and that thereafter, to wit, on the twenty-fifth day of November, in the same year, the said F. Harlow & Company did make with the said Edwin S. Skillen an agreement to sell to him, the said Edwin S. Skillen, for delivery during the then next ensuing month of December, and on such day of that month as the said F. Harlow & Company should select, five thousand bushels of corn, at a price of thirty-three cents per bushel, and for a total sum of sixteen hundred and fifty dollars; and that thereupon, and in accordance with the general custom in such cases on the said board of trade, the two above-mentioned agreements to sell were offset and settled by the payment by the said

Edwin S. Skillen to the said F. Harlow & Company of the sum of fifty dollars, being the difference between the selling prices of the said agreements.

And so the said attorney of the said United States, who prosecutes as aforesaid, does say that the said Edwin S. Skillen, on the said second day of November, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, in manner and form aforesaid, upon a certain board of trade there, with the intent in that behalf aforesaid, unlawfully did make an agreement to sell certain products and merchandise for future delivery, of sixteen hundred dollars in value, and unlawfully did fail and refuse to make and deliver to the seller any bill, memorandum, or other evidence of the said agreement, showing the date thereof, the name of the seller, the amount,

and value of the said sale and agreement, and the matter or
15 thing to which it referred, and unlawfully did fail, neglect, and refuse to make and deliver to the seller any such bill, memorandum, or other evidence as required by law, he, the said Edwin S. Skillen, then and there being the person liable to pay the internal-revenue tax then accruing to the said United States upon the said agreement under the law aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States, who prosecutes, as aforesaid, for the said United States, prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said Edwin S. Skillen, in this behalf to make him answer to the said United States concerning the premises aforesaid.

JOHN C. BLACK,
United States Attorney.

Endorsed: No. 2987. District court, criminal, N. div. The United States *vs.* Edwin S. Skillen. Information on section 25, act of June 13, 1898 (internal-revenue laws). John C. Black, U. S. att'y, N. dist. Ills.

And afterwards, to wit, on the second day of December, A. D. 1898, the affidavit of Frank Harlow was filed in said court, said affidavit being in the words and figures following, to wit:

16 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

Frank Harlow, being duly sworn, deposes and says that he is a citizen of the State of Illinois, and that on the 2nd day of November, 1898, upon the Chicago board of trade, in the city of Chicago, Edwin S. Skillen, of the city of Chicago, a citizen of the State of Illinois and also a member of said board of trade, made with this deponent, for the firm of F. Harlow & Company, of which this deponent is a member, a certain agreement to sell to said F. Harlow & Company five thousand bushels of corn at thirty-two cents per

bushel, or sixteen hundred dollars, to be delivered thereafter on any day in the month of December next that said Skillen should select, without the said Skillen then or subsequently delivering to this deponent or said firm any bill, memorandum, agreement, or other evidence showing the date of said agreement to sell, the name of the seller, the amount of the sale, or the matter or thing to which it referred.

That thereafter and on the 25th day of November, 1898, said F. Harlow & Company agreed to sell to said Skillen a like five thousand bushels of corn at thirty-three cents per bushel, to be delivered on any day during the month of December next that said Harlow & Company should select, and that thereafter, as is the general custom in such cases on the Chicago board of trade, the two said sales were offset and settled by the payment by said Skillen to said Harlow & Company of the sum of fifty dollars, being the difference between said price at which said Skillen had sold and the price at which he had bought back said corn, and in said trans-

action said Harlow & Company did not and, as this affiant is informed and believes, said Skillen did not ever own or have the corn referred to in said agreement to sell or any corn applicable to or for the purpose of delivery thereon.

And further deponent sayeth not.

FRANK HARLOW.

Subscribed and sworn to before me this 2nd day of December, A. D. 1898.

[SEAL.]

WIRT E. HUMPHREY,
*United States Commissioner for the
Northern District of Illinois.*

Endorsed: No. 2987. District court, criminal, N. div. The United States *vs.* Edwin S. Skillen. Affidavit of Frank Harlow. John C. Black, U. S. att'y, N. dist. Ills.

18 And afterwards, to wit, on the 2nd day of Dec., A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge presiding, to wit:

THE UNITED STATES	} 2987. Vio. Int. Rev. Laws.
<i>vs.</i>	
EDWIN S. SKILLEN.	

Comes John C. Black, Esq., district attorney, and on his motion it is ordered by the court that a bench warrant be awarded for Edwin S. Skillen, the defendant herein.

And afterwards, to wit, on the 2nd day of December, A. D. 1898, a bench warrant was issued out of and under the seal of said court, directed to the marshal of the northern district of Illinois, to serve on the defendant, Edwin S. Skillen; which said bench warrant is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, ss :

District Court of the United States of America, Northern District of Illinois.

To the marshal of the northern district of Illinois, Greeting :

We command you to take Edwin S. Skillen, if he shall be found in your district, and him safely keep, so that you have his body before our judge of our district court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, forthwith to answer unto the United States of America in an information pending in said court against him for violating the internal-revenue laws of the United States; and have you then and there this writ, with your return thereon.

Witness the Hon. Peter S. Grosscup, judge of the district court of the United States of America, at Chicago aforesaid, this 2nd day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123rd year.

T. C. MacMILLAN, *Clerk*. [SEAL.]

Endorsed : No. 2987. District court of the United States, northern district of Illinois. United States of America vs. Edwin S. Skillen. Bench warrant, returnable forthwith. T. C. MacMillan, clerk.

And afterwards, to wit, on the 2nd day of December, A. D. 1898, said bench warrant was returned and filed, with the marshal's return thereon endorsed in the words and figures following, to wit :

I have duly executed this writ within my district by arresting the within-named defendant, Edwin S. Skillen, at Chicago, Ills., at 12 o'clock m. December 2nd, 1898, and took him before the Honorable Peter S. Grosscup, judge.

JOHN C. AMES,
U. S. Marshal, Nor. Dist. Ill.

Fees, —.

Endorsed : Returned and filed this 2nd day of December, A. D. 1898. T. C. MacMillan, clerk.

And afterwards, to wit, on the 2nd day of December, A. D. 1898, comes the defendant, by his attorney, and files in said court a motion to quash the information filed herein, said motion being in the words and figures following, to wit :

20 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

UNITED STATES
vs.
EDWIN S. SKILLEN. } 2987.

Now comes the defendant, Edwin S. Skillen, in person and by Henry S. Robbins, his attorney, and moves the court to quash the information filed herein upon the ground that it does not charge a crime against or under the laws of the United States, for the reason that that part of the act of Congress referred to in said stipulation, upon which said information is based, is unconstitutional and void.

Wherefore the defendant prays that said information may be quashed.

EDWIN S. SKILLEN,
By HENRY S. ROBBINS,
His Attorney.

Endorsed: No. 2987. U. S. district court. United States vs. Edwin S. Skillen. Motion to quash. Filed in open court this 2nd day of December, A. D. 1898. T. C. MacMillan, clerk. Henry S. Robbins, Home Insurance building, Chicago.

21 And afterwards, to wit, on the 2nd day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge presiding, to wit:

THE UNITED STATES
vs.
EDWIN S. SKILLEN. } 2987. Vio. Int. Rev. Laws.

Come the parties, by their attorneys, and the defendant in his own proper person, and the defendant, by his counsel, moves the court to quash the information filed herein against him; whereupon, after due consideration, it is ordered by the court that the said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 2nd day of December, A. D. 1898, comes the defendant, by his counsel, and files in said court a demurrer to the information filed herein against him, said demurrer being in the words and figures following, to wit:

- 22 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

UNITED STATES }
vs. }
EDWIN S. SKILLEN. }

And now comes the said Edwin S. Skillen, by Henry S. Robbins, his attorney, and, having heard the said information read, he says that the United States ought not to impeach or implead him, the said Edwin S. Skillen, by reason of the premises in the said information named and specified, because he says that the said information and the matters therein contained are not sufficient in law, and that he need not nor is he obliged by the law of the land to answer thereto, and for ground of demurrer the said defendant avers that that part of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon which said information is based, is unconstitutional and void, and hence said information does not charge an infringement of or crime against the laws of the United States; and this he is ready to verify.

Wherefore and because of the insufficiency of said information the said Edwin S. Skillen prays judgment, and that he may be dismissed and discharged by the court here of and from the premises above charged upon him in form aforesaid.

HENRY S. ROBBINS,
Attorney for Defendant.

Endorsed: No. 2987. U. S. district court. United States vs. Edwin S. Skillen. Demurrer. Filed in open court this 2nd day of December, A. D. 1898. T. C. MacMillan, clerk. Henry S. Robbins, Home Insurance building, Chicago.

- 23 And afterwards, to wit, on the 2nd day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge presiding, to wit:

THE UNITED STATES }
vs. } 2987. Vio. Int. Rev. Laws.
EDWIN S. SKILLEN. }

This cause coming on to be heard upon the demurrer of the defendant to the information filed herein against him, come the parties, by their attorneys, and the defendant in his own proper person, and after hearing the arguments of counsel it is ordered by the court that the said demurrer be, and the same is hereby, overruled.

- 24 And afterwards, to wit, on the 2nd day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES }
 vs. } 2987. Vio. Int. Rev. Laws.
 EDWIN S. SKILLEN. }

Come the parties, by their attorneys, and the defendant in his own proper person, and, being arraigned upon the information filed herein against him, the defendant pleads not guilty thereto and for his defense puts himself upon the country; whereupon comes a jury of good and lawful men, to wit, John C. Turner, James M. Barnes, John Barton, James T. Walsh, M. T. Trowbridge, Henry F. Tallman, George A. Root, J. M. Rhodes, D. M. Roach, Edward A. Palmer, Willard Osborne, and Jacob D. Wilbur, who are duly elected, empaneled, and sworn herein a true verdict to render according to the evidence, who, after listening to the evidence by the parties adduced, arguments of counsel, and charge of the court, retire to their room to consider of their verdict, and afterwards return into court and render their verdict, and upon their oath do say: We, the jury, find the defendant guilty as charged in the information; whereupon the defendant, by his counsel, moves the court for a new trial of this cause.

25 And afterwards, to wit, on the 2nd day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge presiding, to wit:

THE UNITED STATES }
 vs. } 2987. Vio. Int. Rev. Laws.
 EDWIN S. SKILLEN. }

This cause coming on to be heard upon the motion of the defendant for a new trial hereof, come the parties, by their attorneys, and the defendant in his own proper person, and after arguments of counsel and due consideration it is ordered by the court that the said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 2nd day of December, A. D. 1898, a motion in arrest of judgment upon the finding herein was filed in said court, said motion being in the words and figures following, to wit:

26 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Eighteen Hundred and Ninety-eight.

UNITED STATES }
 vs. }
 EDWIN S. SKILLEN. }

Now comes Edwin S. Skillen, by Henry S. Robbins, his attorney, and moves the court in arrest of judgment on the finding herein, and in support of said motion alleges that said information does

not charge or set forth a crime against or under the laws of the United States for the reason that that part of the act of Congress upon which said information is based is unconstitutional and void.

Therefore the defendant prays that judgment be not entered on the finding herein.

EDWIN S. SKILLEN,
By HENRY S. ROBBINS,
His Attorney.

Endorsed: No. 2987. U. S. district court. United States vs. Edwin S. Skillen. Motion in arrest. Filed in open court this 2nd day of December, A. D. 1898. T. C. MacMillan, clerk. Henry S. Robbins, Home Insurance building, Chicago.

27 And afterwards, to wit, on the 2nd day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge presiding, to wit:

THE UNITED STATES }
vs. } 2987.
EDWIN S. SKILLEN. }

This cause coming on to be heard upon the motion of the defendant in arrest of the judgment of the court herein, come the parties, by their attorneys, and the defendant in his own proper person, and after arguments of counsel and due consideration it is ordered by the court that the said motion be, and the same is hereby, overruled; to which the defendant duly excepted.

And afterwards, to wit, on the 2nd day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge presiding, to wit:

THE UNITED STATES }
vs. } 2987. Vio. Int. Rev. Laws.
EDWIN S. SKILLEN. }

Come the parties, by their attorneys, and the defendant in his own proper person, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 2nd day of December, A. D. 1898, one of the days of this term of this court, been adjudged guilty in due form of law, as charged in the information filed herein against him, and being asked by the court if he had anything to say why the sentence and judgment of the court should not be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and
28 judgment of the court upon the findings of guilty so rendered herein, as aforesaid, that the defendant, Edwin S. Skillen, forfeit and pay to the United States a fine in the sum of five hundred dollars, besides the costs in this behalf expended.

It is further ordered by the court that the said defendant stand

committed to the county jail of Cook county, Illinois, until said fine and costs are paid or he is otherwise discharged by law.

For good cause shown it is ordered by the court that execution of the sentence and judgment herein be, and the same is hereby, suspended until Saturday, December 3rd, 1898, at nine o'clock a. m.

NORTHERN DISTRICT OF ILLINOIS, }
Northern Division. }

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in said court in the case of The United States vs. Edwin S. Skillen, as the same appears from the records and files of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at my office, in Chicago, in said district, this 3rd day of December, A. D. 1898.

T. C. MACMILLAN, Clerk,
By C. R. PICKARD,
Deputy Clerk.

(Endorsed :) Filed December 3, 1898. S. W. Burnham, clerk.

29 And on, to wit, the third day of December, in the July term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. William H. Seaman, district judge, appears the following entry, to wit :

In the Matter of the Petition of EDWIN S. SKILLEN for a Writ of *Habeas Corpus*.

Now, on this day, comes the petitioner, by his attorney, and by leave of court files his petition herein, and thereupon it is ordered that a writ of *habeas corpus* issue instant, returnable forthwith ; and now comes the marshal of this district, by John C. Black, Esq., his attorney, and makes return to said writ by personally bringing said Edwin S. Skillen before the court and presenting the record of the judgment upon which said detention is based ; and now comes on to be heard the motion of said petitioner to be discharged under said writ, and the said Edwin S. Skillen being personally present, and also by Henry S. Robbins, Esq., his attorney, and the respondent, John C. Ames, said marshal, being represented by the Hon. John C. Black, United States attorney, and the court, having now heard the arguments to conclusion and not being sufficiently advised in the premises, takes time to consider ; and now comes the petitioner, by his said attorney, and enters his motion to be enlarged on bail, and the court having considered the same, it is ordered that said petitioner, Edwin S. Skillen, be released on bail in the sum of one thousand dollars, with surety to be approved by the court.

30 On the same day, to wit, the third day of December, 1898, a writ of *habeas corpus* issued out of the clerk's office of said court, directed to John Ames, United States marshal, to execute; which said writ, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

Writ of Habeas Corpus.

Circuit Court of the United States of America, Northern District of Illinois, Northern Division, ss:

The United States of America to John C. Ames, U. S. marshal, northern district of Illinois, Greeting:

We command that you do, without excuse or delay, bring or cause to be brought before the circuit court of the United States of America for the northern district of Illinois, now sitting in the court-room of said circuit court, in the city of Chicago, in said district, the body of Edwin S. Skillen, by whatever name or addition he is known or called, and who is unlawfully detained in your custody, as it is said, together with the day and cause of his captivity and detention, then and there to abide such order and direction as our said circuit court shall make in that behalf. Hereof make due return under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this third day of [SEAL.] December, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123rd year.

S. W. BURNHAM, *Clerk.*

31

Marshal's Return.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of EDWIN S. SKILLEN for a Writ of *Habeas Corpus.*

Marshal's return to writ.

I, John C. Ames, hereby certify and make return to the writ of *habeas corpus* issued in this case that I am the marshal of the United States for the northern district of Illinois, and that I now hold the above-named petitioner in my custody as such marshal by virtue of a certain commitment issued by Thomas C. MacMillan, clerk of the district court of the United States for the said district, on this 2nd day of December, 1898, which is set forth in full in the petition filed in this case, and a copy of which is hereto attached, directing me as such marshal to forthwith commit the said petitioner to the county jail of Cook county, in the said State of Illinois,

until a certain fine of five hundred dollars and costs, adjudged against the said Edwin S. Skillen by the said district court on the 2nd day of December, 1898, should be paid or the said petitioner otherwise discharged by law, a transcript of the record of the proceedings of the said district court in which said warrant was issued being attached to the said petition as Exhibit B. Nevertheless I have the body of the said Edwin S. Skillen now before this honorable court.

JOHN C. AMES,
United States Marshal,
By M. E. PATTERSON, *Deputy.*

(Endorsed :) Filed December 3, 1898. S. W. Buruham, clerk.

32 On the same day, to wit, the 3rd day of December, 1898, came Edwin S. Skillen, as principal, and Henry S. Robbins, as surety, and filed in the clerk's office of said court a bail bond; which said bail bond is in words and figures following, to wit:

Bail Bond.

Know all men by these presents that we, Edwin S. Skillen, as principal, and Henry S. Robbins, as surety, are held and firmly bound unto the United States of America in the sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of December, A. D. 1898.

The condition of this obligation is such that whereas on the said 3rd day of Dec., A. D. 1898, in pursuance of the prayer of a petition of the said Edwin S. Skillen, filed in the circuit court of the United States of America for the northern district of Illinois, a writ of *habeas corpus* was issued by order of the Hon. William H. Seaman, judge of said court, directed to John C. Ames, marshal of the said United States for the district aforesaid, and commanding him to have the body of the said Edwin S. Skillen (then in custody of the said marshal by virtue of a certain mittimus theretofore issued upon a sentence and judgment of the district court of the said United States for the same division and district) before the said circuit court, and the said Edwin S. Skillen was thereupon brought before the said judge, and such proceedings were had as that the said Edwin S. Skillen was ordered admitted to bail in the sum of one thousand dollars pending the hearing on the said petition: Now, if the said Edwin S. Skillen shall personally be and appear before the said circuit court from day to day hereafter until the termination of the said hearing, and shall not depart that court without leave thereof, and shall, in case the said court shall

33 refuse to discharge him in pursuance of the said petition and remand him to the custody of said marshal, surrender himself to the said marshal to be further dealt with in pursuance of the

3—625

said mittimus, then this obligation shall be void, and otherwise shall remain in full force.

EDWIN S. SKILLEN. [SEAL.]
HENRY S. ROBBINS. [SEAL.]

Approved this 3rd day of Dec., 1898.

WM. H. SEAMAN, *Judge*.

(Endorsed :) Filed December 3, 1898. S. W. Burnham, clerk.

34 Afterwards, on, to wit, the 3rd day of Dec., in the July term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. William H. Seaman, judge, appears the following entry, to wit:

35 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of EDWIN S. SKILLEN for *Habeas Corpus*.

This cause coming on for a final hearing upon the petition herein and return of the respondent hereto, and the court having heard the argument of counsel and being fully advised in the premises, the court finds and adjudged that said act of Congress does not violate the Constitution, and that the commitment and imprisonment of the prisoner under the warrant of *habeas corpus* in this case are sufficient cause and return in law for his detention by said marshal; therefore—

It is ordered by the court that the writ of *habeas corpus* allowed in this case be dismissed, and that the prisoner be remanded and continued in the custody of such marshal under such his arrest and commitment by the aforesaid process, referred to in the return of said marshal, and that the respondent have and recover from the petitioner herein the costs by him incurred in this matter; to which the petitioner duly excepts.

Thereupon said petitioner, Edwin S. Skillen, having presented to and filed in said court his assignments of errors and petition for appeal from this order to the Supreme Court of the United States—

It is further ordered that said appeal be allowed upon said petitioner's filing his appeal bond in the penal sum of three hundred dollars, to be approved by this court.

It is further ordered that upon said Skillen filing his appeal bond, as aforesaid, the order of judgment appealed from herein be, and the same is hereby, superceded until the final decision of the Supreme

Court upon said appeal, and the said Edwin S. Skillen be
36 not taken into custody upon his filing in this court a recognition and bail bond, with surety in the sum of one thousand dollars, conditioned for his appearance to answer the judgment of said Supreme Court upon said appeal.

Thereupon the said Edwin S. Skillen presents in open court his appeal bond, and it is ordered that the same stand approved, and that the clerk of this court send up to the October term, A. D. 1898,

of the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings to such cause.

37 On the same day, to wit, on the 3rd day of December, 1898, came Edwin S. Skillen, by his attorney, and filed in the clerk's office of said court his petition for appeal; which said petition for appeal is in the words and figures following, to wit:

Petition for Appeal.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of EDWIN S. SKILLEN for *Habeas Corpus*.

And now comes the petitioner, Edwin S. Skillen, and deeming himself aggrieved by the judgment or order of this court entered the 3rd day of Dec., 1898, herewith presents his assignments of errors and prays that an appeal may be allowed from said order to the Supreme Court of the United States, and that a transcript of the records and proceedings upon which said judgment was made may be sent, duly authenticated, to the Supreme Court of the United States.

EDWIN S. SKILLEN,
By HENRY S. ROBBINS,
His Attorney.

(Endorsed:) Filed December 3, 1898. S. W. Burnham, clerk.

On the same day, to wit, the 3rd day of December, 1898, came Edwin S. Skillen, by his attorney, and filed in the clerk's office of said court his assignments of error; which assignments of error are in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of EDWIN S. SKILLEN for *Habeas Corpus*.

38 And now comes the petitioner, Edwin S. Skillen, and, for the purpose of appeal from the order entered herein to the Supreme Court of the United States, hereby assigns the following errors upon the record of this cause:

First. That the circuit court erred in dismissing the petition and writ of *habeas corpus* and remanding the petitioner to the custody of the marshal.

Second. That the circuit court erred in not sustaining said petition and discharging said petitioner from arrest.

Third. That the circuit court erred in not holding that part of the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon which said petitioner was convicted, unconstitutional and in not adjudging said petitioner by reason thereof entitled to his discharge.

Wherefore said petitioner prays that said decree, judgment, or order may be reversed and said circuit court be directed to enter an order discharging said petitioner.

EDWIN S. SKILLEN,
By HENRY S. ROBBINS,
His Attorney.

On the same day, to wit, the 3rd day of December, 1898, came Edwin S. Skillen, as principal, and Henry S. Robbins, as surety, and filed in the clerk's office of said court an appeal bond; which said appeal bond is in the words and figures following, to wit:

39 Know all men by these presents that we, Edwin S. Skillen, as principal, and Henry S. Robbins, as sureties, are held and firmly bound unto the United States of America in the full and just sum of three hundred dollars, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a circuit court of the United States of America for the northern district of Illinois, in a suit depending — said court *between* in the matter of the petition of Edwin S. Skillen for a writ of *habeas corpus*, a judgment was rendered against the said Edwin S. Skillen, dismissing the writ of *habeas corpus* theretofore issued therein, and the said Edwin S. Skillen having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 5 days from the date thereof:

Now, the condition of the above obligation is such that if the said Edwin S. Skillen shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in force and virtue.

EDWIN S. SKILLEN. [SEAL]
HENRY S. ROBBINS. [SEAL]

Approved by—

WM. H. SEAMAN, *Judge.*

(Endorsed:) Filed Dec. 3, 1898. S. W. Burnham, clerk.

40 UNITED STATES OF AMERICA, ss :

To John C. Ames, United States marshal for the northern district of Illinois, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 5 days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein Edwin S. Skillen is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Seaman, judge, this 3rd day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

WM. H. SEAMAN,
U. S. Dist. Judge.

41 [Endorsed:] Supreme Court of the United States. Edwin S. Skillen *vs.* John C. Ames, marshal. Citation. I hereby accept service of the within citation. John C. Ames, U. S. marshal for the northern district of Illinois, by M. E. Patterson, deputy.

42 NORTHERN DISTRICT OF ILLINOIS, } ss :
Northern Division,

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had in said court in the matter of the petition of Edwin S. Skillen for writ of *habeas corpus*, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this third day of December, 1898.

[Seal Circuit Court U. S., Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Clerk.*

[Endorsed:] In the United States Supreme Court. Edwin S. Skillen, appellant, *v.* John C. Ames, marshal, appellee.

Endorsed on cover: File No. 17,210. N. Illinois C. C. U. S. Term No., 625. Edwin S. Skillen, appellant, *vs.* John C. Ames, United States marshal for the northern district of Illinois. Filed December 6th, 1898.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 636.

CHARLES H. INGWERSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

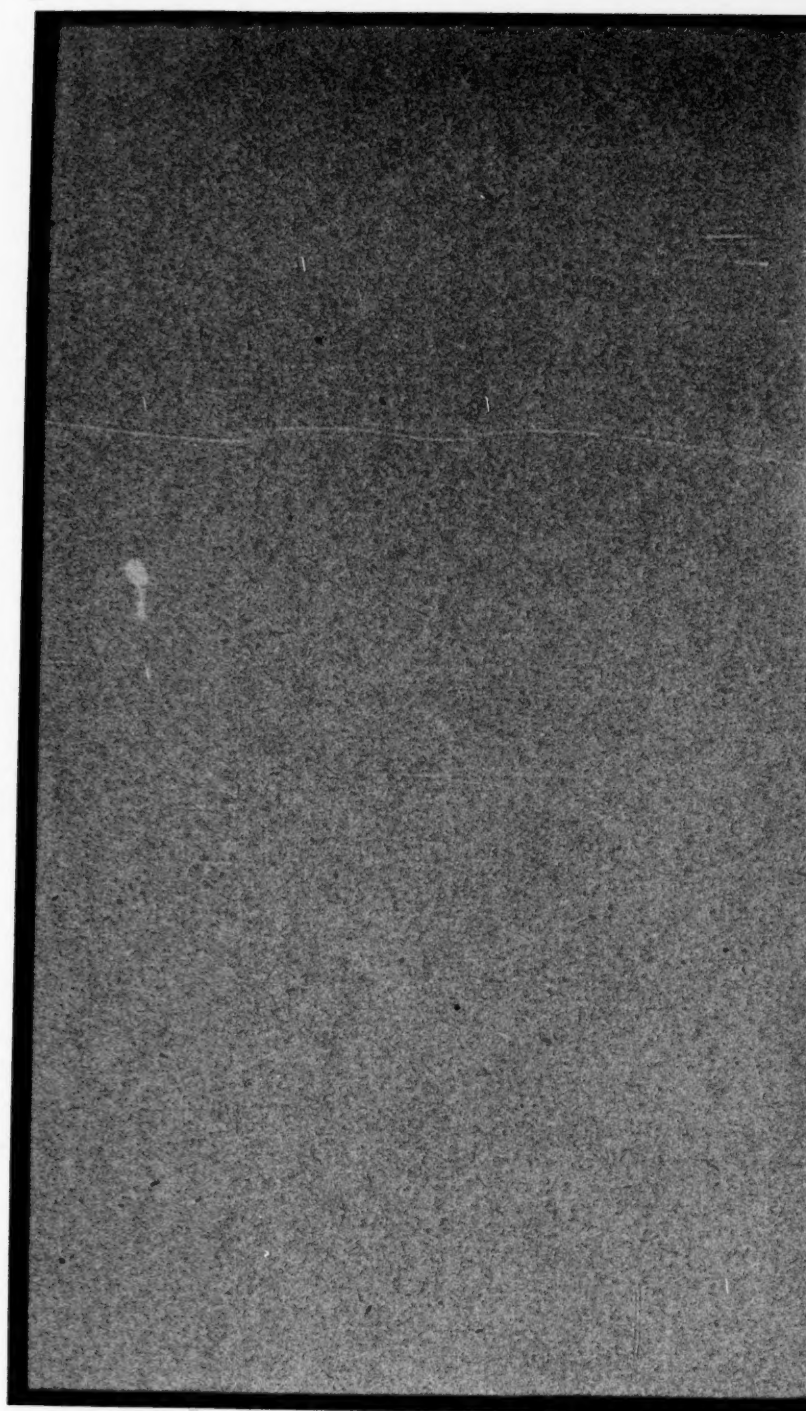
IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS

FILED DECEMBER 13, 1898.

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(17,221.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 636.

CHARLES H. INGWERSEN, PLAINTIFF IN ERROR,

v.s.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS

INDEX.

	Original.	Print.
Caption	1	1
Order to file information	1	1
Information	3	2
Exhibit A—Description of the Union stock yards	8	4
B—Act of incorporation and by-laws of the Union Stock Yard and Transit Company of Chicago ...	9a	5
Affidavit of Frank E. Hemstreet.....	10	13
Motion to quash information	12	14
Demurrer to information	14	15
Order taking motion to quash under advisement	16	16
Order taking demurrer under advisement.	17	17
Order overruling motion to quash	17	17
Order overruling demurrer.	18	17
Order entering <i>nolle prosequi</i> as to first count	18	18
Trial and verdict.....	18	18
Order overruling motion for new trial.	19	18
Order overruling motion for judgment <i>non obstante veredicto</i>	19	19
Order overruling motion in arrest of judgment	20	19

INDEX.

	Original.	Print.
Judgment	20	19
Petition for writ of error, &c.	22	20
Order granting writ of error to operate as supersedeas, &c.	24	21
Supersedeas bond.	25	21
Assignment of errors.	28	23
Bill of exceptions.	40	28
Evidence for complainant.	41	29
Testimony of W. B. Ingwerson	41	29
C. W. Baker.	47	33
Defendant's motion for instructions.	71	45
Charge to jury.	74	46
Judge's certificate to bill of exceptions.	77	47
Clerk's certificate.	78	48
Writ of error.	79	48
Return on writ of error.	80	49
Citation and service.	81	49

- 1 Pleas had at a regular term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the first Monday of July, it being the fourth day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third year.

Present: The Honorable Peter S. Grosscup, judge of said court, presiding; John C. Ames, United States marshal for said district, and T. C. MacMillan, clerk of said court.

THE UNITED STATES
vs.
CHARLES H. INGWERSEN. } 2946.

Be it remembered that heretofore, to wit, on the 31st day of October, A. D. 1898, it being one of the days of the July term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the first Monday of July, it being the fourth day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third year, before the Honorable Peter S. Grosscup, judge of said court, presiding, the following order was had and entered of record in said cause, to wit:

THE UNITED STATES
vs.
CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

- Comes John C. Black, Esq., district attorney, and presents an information against Charles H. Ingwersen, the defendant herein, charging the said Charles H. Ingwersen with violating section
- 2 25 of the act of Congress of June 13, 1898, and asks leave of the court to file the same; whereupon it is ordered by the court that said information be filed and the cause placed upon the dockets of this court.

And afterwards, to wit, on the 31st day of October, A. D. 1898, said information was filed, the same being in the words and figures following, to wit:

- 3 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the October Adjourned Term, in the Year Eighteen Hundred and Ninety-eight.

NORTHERN DISTRICT OF ILLINOIS, }
Northern Division, } *set:*

Be it remembered that John C. Black, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the district aforesaid, on this thirty-first day of October, in this same term, and for the said United States gives the court here to understand and be informed that Charles H. Ingwersen, late of the city of Chicago, in the northern division of the said district, on the eleventh day of August, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, at a certain exchange and place similar to an exchange and board of trade—that is to say, at the Union stock yards of Chicago—particularly described in a paper marked “Exhibit A,” attached to and made a part of this information, and then owned and conducted by the Union Stock Yard and Transit Company of the City of Chicago (a corporation then and there existing) under and pursuant to its charter and by-laws, copies of which are also attached to and made

- a part of this information, marked “Exhibit B,” unlawfully
4 did make, as agent for Ingwersen Brothers and Smith, a corporation then existing under that name, theretofore incorporated under the laws of the State of Illinois for the purpose of carrying on the business of a live-stock commission merchant and a dealer in live stock, to one Edward Egan, as agent for the T. C. Eastman Company, a corporation then existing under that name, theretofore incorporated under the laws of the State of New York for the purpose of dealing in live stock, a certain sale of merchandise for present delivery—that is to say, of one hundred and thirty head of cattle, weighing 186,160 pounds, at a price of five dollars and thirty-five cents per hundred pounds, and six head of cattle, weighing 7,830 pounds, at a price of four dollars and seventy-five cents per hundred pounds, for a total sum of ten thousand three hundred and thirty-one dollars and forty-eight cents (the same being cattle and merchandise then lately before consigned to the said Ingwersen Brothers and Smith for sale upon commission for account of the owner thereof, to wit, one A. B. Bell, of Ida Grove, Iowa)—and did then and there deliver the same merchandise, in pursuance of the said sale, without there and then or afterwards making and delivering to the said Edward Egan, as agent for the said T. C. Eastman Company, or to any other person as such agent, or to the said company, any bill, memorandum, agreement, or other evidence of the said sale showing the date thereof, the name of the seller, the amount of the sale, and the matters and things to which it referred, as required by law, and with intent then and there, on

5 the part of him, the said Charles H. Ingwersen, to evade the provisions in that behalf in the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and did refuse, fail, and neglect to make and deliver, as such agent, as aforesaid, to any person any such bill, memorandum, agreement, or other evidence of the said sale, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the said attorney of the said United States, who prosecutes, as aforesaid, for the said United States, further gives the court here to understand and be informed that the said Charles H. Ingwersen, on the fourteenth day of October, in the same year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, at a certain exchange and place similar to an exchange and board of trade—that is to say, at the Union stock yards of Chicago—particularly described in a paper marked "Exhibit A," attached to and made part of this information, and then owned and conducted by the Union Stock Yards and Transit Company of the City of Chicago (a corporation then and there existing) under and pursuant to its charter and by-laws, copies of which are also attached to and made a part of this information, marked "Exhibit B," with intent then and there on the part of him, the said Charles H. Ingwersen, to evade the provisions in that behalf in the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," unlawfully did make, as agent for Ingwersen Brothers and Smith, a corporation then existing under
6 that name, theretofore incorporated under the laws of the State of Illinois for the purpose of carrying on the business of a live-stock commission merchant and a dealer in live stock, to one David Moog a certain sale of merchandise for present delivery—that is to say, of nineteen head of cattle, weighing 22,280 pounds, at a price of five dollars and twenty-five cents per hundred pounds, for a total sum of eleven hundred and sixty-nine dollars and seventy cents (the same being cattle and merchandise then lately before consigned to the said Ingwersen Brothers and Smith for sale upon commission for the account of one H. Hughes, of Hartwick, Iowa)—and did then and there deliver the cattle and merchandise in this count mentioned in pursuance of the last-mentioned sale, and—deliver to the said David Moog a memorandum of the same sale showing the date thereof, the name of the seller, the amount of the sale, and the matters and things to which it referred, without then and there having the proper stamps affixed thereto for denoting the payment of the internal-revenue tax upon the last-mentioned sale and memorandum, as required by law, and did refuse, fail, and neglect to affix any such stamps to the said memorandum, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney for the said United States, who prosecutes, as aforesaid, for the said United States, prays the consid-

eration of the court here in the premises, and that due process of law may be awarded against him, the said Charles H. Ingwersen, in this behalf, to make him answer to the said United States concerning the premises aforesaid.

JOHN C. BLACK,
United States Att'y.

Endorsed: No. 2946. District court, criminal, northern div. The United States vs. Charles H. Ingwersen. Information on sec. 25, act of June 13, 1898 (internal-revenue laws). Filed October 31st, A. D. 1898. T. C. MacMillan, clerk. John C. Black, U. S. att'y, N. dist. Ills.

8

"EXHIBIT A."

The Union stock yards described in this information, at the respective times therein mentioned and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street and Forty-seventh street and Halsted street and Ashland avenue, in the city of Chicago, in the county of Cook and State of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the city of Chicago, extend into the yards, over which cattle, hogs, and other live stock received at or shipped from the Union stock yards are carried. Upon the arrival of cattle, hogs, or other live stock at the Union stock yards consigned to the commission merchant at the Union stock yards, such cattle, hogs, or other live stock are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are there cared for, fed, and watered by such owner or consignee. Any person is at liberty to send, take, or to receive cattle, hogs, or other live stock into the Union stock yards, and there place, or have the same placed, in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell.

9 Any person has access to the pens containing cattle, hogs, or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs, and other live stock in the yards are at private sale. Commission merchants having cattle, hogs, or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found take him to the pens in which such live stock is contained, and there exhibit such live stock; and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs, and sheep in the yards are by weight, and upon a sale thereof being made such live stock if taken by the owner or commission merchant having charge thereof

from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Stock Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company and in charge of the scale in which said live stock are weighed, and the weight of such live stock is thereby determined as the weight for which the purchaser pays upon his purchase, and the amount of the purchase price at the price per pound or per hundred pounds fixed in such sale is thereby determined.

[Endorsed:] U. S. v. Ingwersen. Copy of information.

9a

Ex B.

Act of Incorporation and By-laws of the Union Stock Yard and Transit Company of Chicago.

Incorporated February 13, 1865.

By-laws adopted by the board of directors April 19, 1865.

9b

Act of Incorporation and By-laws of the Union Stock Yard and Transit Company of Chicago.

Incorporated February 13, 1865.

By-laws adopted by the board of directors April 19, 1865.

9c

Charter.

An act to incorporate the Union Stock Yard and Transit Company of Chicago.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That John L. Hancock, Virginius A. Turpin, Roselle M. Hough, Sidney A. Kent, Charles M. Culbertson, Lyman Blair, David Kreigh, Joseph Sherwin, Martin L. Sykes, Jr., George W. Cass, James F. Joy, John F. Tracy, Timothy B. Blackstone, Joseph H. Moore, John S. Barry, Homer E. Sargent, Burton C. Cook, John B. Drake, William D. Judson, and such other persons as may associate with them for that purpose, be, and the same are hereby made a body politic and corporate, by the name and style of "The Union Stock Yard and Transit Company of Chicago," with perpetual succession; and by that name and style may contract and be contracted with, sue and be sued, have a common seal, which they may alter and revise at pleasure, and may have and exercise all the rights, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as the same are herein set forth.

SEC. 2. That said company shall have the power to locate, construct and maintain, upon the land purchased for such purpose, in

convenient proximity to the southerly limits of the city of Chicago, and west of Wallace street, as the same would be extended in a straight line south from said city limits, all the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches and turnouts, aqueducts, for the reception, safe keeping, feeding and watering, and for the weighing, delivery and transfer of cattle and live stock of every description and also dead and undressed animals that may be at, or passing through or near the city of Chicago, and for the accommodation of the business of a general Union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same, if deemed expedient, for the convenience of drovers, dealers and the public doing business at the said yards; and shall have power to repair, enlarge, relocate, reconstruct and alter the said yards, structures and buildings, or any of them, as shall become necessary or expedient from time to time; subject, nevertheless, to the restrictions above mentioned as to the location of the same; and shall have the right and power to make advances of money upon such cattle and live stock, for freight or other purposes, as may become expedient, and for such care, subsistence and handling, and advances made upon such stock, the said company may take and require to be paid, such reasonable charges as may be deemed just and proper, and shall have the power to lease the public house or hotel building so erected for the accommodation of those drawn together by the business of such yards, upon such terms and conditions as shall be deemed proper, or to make such other arrangements for the management thereof as may be deemed advisable, from time to time; and if the same shall be kept and managed by said company, shall have the power to fix and require to be paid, such reasonable charges for the accommodation afforded by said house or houses, as shall be just and proper.

SEC. 3. The said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the city of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, and on the west between said last-named point and the north line of section number nineteen (19), township number thirty-nine (39)
9d north, range fourteen (14), east of the third principal meridian, and shall have the right and power to make such connections with such suitable side tracks, switches and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies, which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; and shall have the power and authority to locate, and, from time to time, renovate, change, alter, construct and reconstruct, and fully to finish and maintain its said railroad

or roads, side tracks and connections, and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same, to and from said yards, and may also transport and allow to be transported between the railroads entering said city, and so connected by the road or roads hereby authorized, by steam or other power, freight and property of every kind as well as stock and cattle, and may fix and establish, take and receive, such rates of toll for all freight and property so transported between said several railroads as the directors shall, from time to time, establish: Provided, all fees and charges for freights, hotel bills, feeding, carrying and everything done by reason of the powers herein given, shall be subject to any general law that may be passed by the legislature of this State, in reference to stock yards or railroads; and for the purpose of constructing said railroad and appurtenances, shall have the authority and power to lay out, designate and establish the road, in width not exceeding one hundred feet through the entire line thereof, and to mark out and designate the ground for such yard and other structures, and may acquire such lands, which may be necessary for the purpose of constructing said tracks, either by purchase or in the manner hereinafter provided, with the right to let or demise the real estate and property so acquired, and improvements thereon; and shall also have the right and authority to take a lease or leases of ground for said yards, upon such terms as the directors of said company may deem just and reasonable, and all contracts and agreements made in connection with such lease or leases shall be valid and binding upon the parties thereto; and said company shall have the right, with the consent of the proper authorities having control thereof, to locate or construct its roads across any street or highway, doing as little damage and discommoding the public as little as may be consistent with the use of said track so laid.

SEC. 4. The said company shall have power and authority to receive, take and hold all such voluntary grants and donations of land and real estate as may be made to said company, for the purpose aforesaid, and may contract and agree with the owners and occupiers of any land which may be necessary for such purposes, or which said company may desire to use in connection therewith, in order to carry out the objects of its organization; and said company is authorized and empowered to receive and take grants and conveyances of all interests and estates in such lands to them and their successors and assigns, in fee or otherwise, and in case the said company cannot agree with the owners or occupiers of lands, necessary for the railroad tracks herein permitted to be constructed, so as to procure the same by the voluntary deed of such owners or occupiers or if such owners or occupiers or any of them be a *femme covert*, infant *non compos mentis* unknown or out of the county of Cook, the same may be taken for the purpose of constructing said railroad track (but for no other purpose), and paid for, if any damages are awarded, in the manner provided for in the "Act to amend the law condemning the right of way for purposes of internal improvement," approved June 22, A. D. 1852, and the acts amendatory

thereof, to the benefits of all the rights, privileges, franchises and immunities contained in the provisions of which said act and the amendments thereof, said company shall be, and are hereby, declared entitled.

96 SEC. 5. The capital stock of said company shall be one million of dollars, which stock shall be divided into shares of one hundred dollars each, which shall be deemed personal property, and may be taken and held by individuals, and may be issued to such persons, and certified, transferred and registered in such manner and in such places as may be ordered and provided for by the board of directors, who shall have the power to require the payment for the stock subscribed, in the manner, at the time and in such terms as they may direct; and the same may be paid for in real estate or in personal property, under the direction of said board of directors, who shall, also, have power to declare dividends upon profits earned by said company. On the refusal or neglect of any stockholder to make payment on the requisitions of the board of directors, the share or shares of such delinquent may, after thirty days' public notice in one of the daily newspapers of Chicago, be sold at public auction, under such rules as the directors may adopt.

SEC. 6. The corporate powers of said company shall be vested in and exercised by a board of directors, to consist of not less than five nor more than nine in number, and such other officers, agents and servants as they shall appoint. The first board of directors shall consist of Martin L. Sykes, Jacob N. McCullough, James F. Joy, John F. Tracy, Timothy B. Blackstone, John L. Hancock, Roselle M. Hough, Charles M. Culbertson, and Virginus A. Turpin, who shall hold their office until the third Wednesday of January, A. D. 1866, and until their successors are elected and qualified. Vacancies in said board may be filled by a vote of two-thirds of the directors remaining, such appointees to continue in office until the next regular annual election of directors, and which said annual election shall be held on the third Wednesday of January in each year, at such place as the directors may appoint, thirty days' notice being given in one newspaper in Chicago, of the time and place of such election.

SEC. 7. At any election of directors, each share of stock shall be entitled to one vote, to be given either in person or proxy, and the person receiving the largest number of votes to be declared duly elected, and to hold the office until the next annual election, and until their successors shall be duly qualified; and if for any cause the annual election shall fail, the company shall not be dissolved, but the directors in office shall continue to hold their places as directors, until an election shall be had and their successors duly elected and qualified.

SEC. 8. The directors herein named shall organize their board by electing one of their number president, and by appointing a secretary and treasurer. The said company shall have power to make, ordain and establish by-laws, rules and regulations necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering and securing the affairs, business and interests

of the company, provided the same shall not be repugnant to the Constitution and laws of the United States or of this State.

SEC. 9. Should it be necessary for the construction of the road or roads, hereby authorized to be built, to cross any water-course, stream of water or road, it shall be lawful, under the direction of the proper authorities having control thereof, to construct the said road upon or across the same; provided, the same shall be so constructed as not to unnecessarily impair the usefulness of said road or water-course.

SEC. 10. The said company is hereby authorized, from time to time, to borrow such sums of money as it may deem expedient, and to issue and dispose of their bonds therefor in denominations of not less than five hundred dollars each, and to an amount which, in the aggregate, shall not exceed five hundred thousand dollars, and bearing such rate of interest, not exceeding ten per cent., as the com-

pany shall deem expedient, and to secure the payment of the same, may execute a mortgage or deed of trust of all its property of every description, in possession or to be acquired, with such terms, stipulations and conditions as may be deemed expedient.

SEC. 11. Nothing in this act contained shall be deemed, taken or construed as conferring upon the company hereby created, any powers or authority to maintain or operate a railroad for the conveyance of passengers or freight in the city of Chicago. And the said company hereby incorporated, is hereby expressly prohibited from making any contract or having any agreement, either expressed or implied, with any railroad company, to receive cattle, hogs or other freight transported over the road of any such railroad company, to the exclusion of any person or corporation having a stock yard in proximity to said city; and said company hereby incorporated, shall not receive any cattle, hogs or other stock consigned to any other person or company having a stock yard in proximity to said city; and any willful violation of any of the provisions of this act by the company hereby incorporated, shall work an absolute forfeiture of all the rights, privileges and immunities conferred by this act, and the franchises hereby conferred shall become utterly void.

SEC. 12. This act shall be deemed a public act, and shall be in force from and after its passage.

ALLEN C. FULLER,
Speaker of House of Representatives.
WILLIAM BROSS,
Speaker of the Senate.

Approved February 13, 1865.
RICHARD J. OGLESBY.

Amendment.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That the board of directors of the Union Stock Yards and Transit Company of Chicago be, and the same is hereby authorized from time to time, to increase the capital stock of said company five hundred thousand dollars, in

addition to its present capital ; but no stock shall be issued for a less sum or amount than the par value thereof actually paid in, in cash.

3 Pr. Laws 1867, 7th March, 100.

9g UNITED STATES OF AMERICA, } ss :
State of Illinois,

I, Sharon Tyndale, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true copy of an enrolled law entitled "An act to incorporate the Union Stock Yard and Transit Company of Chicago," now on file in my office.

In witness whereof I have hereunto set my hand, and affixed the great seal of State, at the city of Springfield, this fifteenth day of February, A. D. 1865.

SHARON TYNDALE,
Secretary of State.

9h *By-laws of the Union Stock Yard and Transit Company of Chicago.*

ARTICLE I.

Annual Meeting.

The annual meeting of the stock-holders for the election of directors, and for such other business as shall be brought before them, shall be held on the third Wednesday of January in each and every year, at the office of the company, in the city of Chicago. Notice of the time and place of the meeting, signed by the president or secretary, shall be published in one or more of the daily newspapers of the city of Chicago, at least thirty days previous to such meeting.

At all meetings stockholders may vote in person or by proxy, and shall have one vote for each and every share of stock standing in their names.

ARTICLE II.

Election of Directors.

At the annual meeting there shall be elected such a number of directors as shall have been or may be determined by said stockholders, and their election shall be by ballot ; and such other business may be transacted as shall be brought before them within the power of the company and the charter thereof.

At all elections of directors, the board of directors shall be judges of the qualifications of voters, and shall prescribe rules and regulations for voting. The board may commit its powers in this matter to a committee of its own members. The election of directors shall be held on the day designated for that purpose unless prevented by accident, in which case the board shall designate another

day for the election. The proceedings of any meeting of the stockholders shall be entered by the secretary in full on the minutes of the company.

ARTICLE III.

Officers of the Company.

The officers of the company shall consist of a president, a vice-president, second vice-president, secretary, treasurer and general superintendent. An assistant secretary and assistant treasurer also may at any time be appointed by the board. The offices of secretary and treasurer and of assistant secretary and assistant treasurer may respectively be held by one person.

ARTICLE IV.

The board of directors, at their first meeting after every annual election of the company shall elect by ballot the president, vice-president, second vice-president, secretary and treasurer; also the assistant secretary and assistant treasurer, whenever they shall determine to have such officers, or either of them; and such officers shall hold their offices during the pleasure of the board. They may also appoint a superintendent, engineer, agents and such other officers as they may judge proper and prescribe their salaries.

ARTICLE V.

The president shall preside at all meetings of the stockholders or directors, if present, and shall have such powers and perform such duties as may be, from time to time, conferred upon him by the board of directors. He shall have the general supervision of the affairs of the company and it shall be his duty as chief executive officer to see that the orders and resolutions of the board are carried into effect. The vice-president shall, in the absence of the president, or in case of inability, from any cause, of the president to perform the duties of the office, be invested with all the power and authority now or hereafter, vested in the president, in virtue of the charter and by-laws of this company. The second vice-president shall, in the absence of the president and vice-president, or in case of the inability from any cause, of the president or vice-president to perform the duties of the office of president, be invested with all power and authority now or hereafter vested in the president, by virtue of the charter and by-laws of the company. The president shall have power to call meetings of the board, from time to time when he shall think proper; and it shall be his duty to call such meetings whenever requested by any two of the directors in writing. He shall conduct the correspondence and attend generally to the execution of the business of the company, under the direction of the board.

ARTICLE VI.

Duties of Secretary and Assistant Secretary.

It shall be the duty of the secretary to give public notice of all meetings of the stockholders in the manner prescribed by article 1. He shall also notify the members of the board of directors of all special meetings of the board, when the same shall be called by the president. He shall attend all meetings of the board of directors, when practicable, and keep a true and fair record of their proceedings in a book kept for that purpose, and shall safely keep all papers and documents which shall come into his possession as secretary, and shall prepare such statement and accounts for the directors and officers as may from time to time be required by them. He shall have the custody of the corporate seal of the company and affix same to all papers which require sealing and which have been signed by the president. He shall keep the general books and accounts of the company so as to show the true condition of affairs; he shall also sign all certificates of stock and such other papers and documents as are required by the charter, resolutions of the board or by-laws of the company.

It shall be the duty of the assistant secretary to do and perform such of the duties of the secretary as are consistent with the charter, and as may from time to time be required of him by the board of directors.

ARTICLE VII.

Duties of the Treasurer.

It shall be the duty of the treasurer to safely keep and account for all moneys, funds and property of the company, and to render such account, and present such statement to the directors and officers as may, from time to time, be required of him. It shall also be his duty to pay at all times, whenever there are funds of the company in his hands, such sums as may be required, upon order or warrant of the superintendent, countersigned by such other officer of the board, or of the company, as may, from time to time, by the board of directors be authorized to make drafts upon him, as such treasurer, and in no other way; and for the faithful performance of all duties required of him, he shall give to the company a bond in such sum of money as shall be designated by the board of directors, which bond shall be to the satisfaction and approval of said board of directors.

ARTICLE VIII.

Duties of the General Superintendent.

It shall be the duty of the superintendent to exercise a general supervision over the yards, enclosures, buildings, structures and railway lines of the company; and with the approbation of the president, he shall appoint all persons about the works of the com-

pany and may remove them at pleasure, and shall perform such other duties as may be assigned him from time to time by the president or board of directors.

ARTICLE IX.

The stock of this company shall only be transferable upon the stock transfer book kept for such purpose by the secretary, and shall not be transferable while any assessment or calls remain due and unpaid thereon, and in all cases upon the transfer of any stock, the former certificate shall be surrendered and a new certificate issued in the name of the party to whom the transfer is made, and upon the payment of any installments due upon stock, the certificate of stock upon which same is paid shall be surrendered and a new certificate issued, specifying the amounts which shall have been paid upon said stock. All certificates issued for stock shall be signed by the president and countersigned by the secretary.

ARTICLE X.

These by-laws may be altered and amended at any meeting of the board of directors, by a majority of all the members, prior notice thereof having been given to the board at one of its previous meetings.

10 And afterwards, to wit, on the 31st day of October, A. D. 1898, the affidavit of Frank E. Hemstreet, deputy collector of internal revenue for the first collection district of Illinois, was filed in said court, said affidavit being in the words and figures following, to wit :

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

UNITED STATES OF AMERICA	} No. —. Information.
vs.	
CHARLES H. INGWERSEN.	

Frank E. Hemstreet, a deputy collector of internal revenue for the first collection district of Illinois, makes oath and says that he is informed and believes that Charles H. Ingwersen, on the 14th day of October, A. D. 1898, at the city of Chicago, in the said division and district, at a certain exchange and place similar to an exchange and board of trade, to wit, the Union stock yards of Chicago, unlawfully did make a sale of merchandise, to wit, nineteen head of cattle, to one David Moog, for the sum of \$1,169.70, and did then and there deliver the said cattle and merchandise and deliver to the buyer, to wit, the said David Moog, a memorandum of the same sale, without then and there having the proper stamps affixed thereto for denoting the internal-revenue tax upon the same, with intent to evade the provisions in that behalf of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to

meet war expenditures, and for other purposes;" and, further, that the said Charles H. Ingwersen, on the 11th day of August, 1898, at the city of Chicago, in the said division and district, at a certain exchange and place similar to an exchange and board of

11 trade there, to wit, the Union stock yards of Chicago, unlawfully did make a sale of merchandise, to wit, 136 head of cattle, for a total sum of \$10,331.48, and did then and there deliver the said cattle and merchandise without then and there or afterwards making and delivering to the buyer, to wit, one Edward Egan, any bill, memorandum, agreement, or other evidence of the said sale, as required by law, with intent to evade the provisions in that behalf in the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," contrary to the form of the statute of the said United States in such case made and provided.

FRANK E. HEMSTREET,
Dep'ty Cl'k, 1st Dist. Ills.

Sworn and subscribed before me by the above-named Frank E. Hemstreet this 29th day of October, A. D. 1898.

C. R. PICKARD,
U. S. Commissioner, Nor. Dist. Illinois.

Endorsed: No. 2946. District court, criminal, northern div. The United States vs. Charles H. Ingwersen. Affidavit of Frank E. Hemstreet, dep. coll'r int. rev. Filed Oct. 31st, A. D. 1898. T. C. MacMillan, clerk. John C. Black, U. S. att'y, N. dist. Ills.

And afterwards, to wit, on the 2nd day of November, A. D. 1898, came the defendant, by his attorney, and filed in said court a motion to quash the information filed herein; which said motion is in the words and figures following, to wit:

12 In the District Court of the United States for the Northern District of Illinois, Northern Division Thereof.

UNITED STATES	} Copy.
vs.	
CHARLES H. INGWERSEN.	

Motion to Quash Information and Each Count Thereof.

And the said Charles H. Ingwersen, in his own proper person, comes into court here and, having heard the said information and each count thereof read, moves that the said information and that each count thereof be quashed upon the following grounds:

1. That the said pretended acts, defaults, and omissions of the defendant in the said information and in the said respective counts thereof mentioned are not, nor are any or either of them, within the provisions, prohibition, or requirement of the said act of Congress.

- 13 2. That the said respective sales by defendant in the said information mentioned are not within the provisions of the said act of Congress.
3. That the said sales, agreements of sale, or agreements to sell in the said information mentioned were not, nor was either of them, a sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade or other similar place within the meaning of Schedule A of said act of Congress in said information mentioned.
4. That the said act of Congress and the said respective provisions thereof in the said information mentioned are in violation of the Constitution of the United States and void.
5. That the said respective counts in said information mentioned do not, nor does either of them, set up or charge or aver any offense within the said act of Congress or otherwise.

JOHN S. MILLER &
MERRITT STARR,
Att'ys for Defendant.

Endorsed: Gen. No., 2946; term No., —. In the U. S. district court, northern district of Ill., northern division. *United States vs. Charles H. Ingwersen.* Motion to quash information. Filed on this 2nd day of November, A. D. 1898. T. C. MacMillan, clerk. Peck, Miller & Starr, counselors-at-law, 913-916 Monadnock block, Chicago.

And afterwards, to wit, on the 2nd day of November, A. D. 1898, came the defendant, by his attorney, and filed in said court a demurrer to the information filed herein; which said demurrer is in the words and figures following, to wit:

- 14 In the District Court of the United States for the Northern District of Illinois, Northern Division Thereof.

UNITED STATES
v.
CHARLES H. INGWERSEN. } Copy.

And the said Charles H. Ingwersen, in his own proper person coming into court here, having heard the said first count of the said information read, says that the said first count of said information and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said Charles H. Ingwersen, is not bound by the law of the land to answer the same for the reasons, among others, that the said first count of the said information doth not charge or state any offense under the said act of Congress therein mentioned, and because the said act of Congress and the said tax imposed thereby and the provisions of said act do not apply to the said sale or agreement of sale or agreement to sell made by the said defendant in said first count mentioned, and because said act of Congress in the said first count

mentioned and the provisions thereof therein mentioned are in violation respectively of the provisions of the Constitution of the United States and are void ; and this he is ready to verify. Wherefore, for want of sufficient information in this behalf, the said

15 Charles H. Ingwersen prays judgment and that by the court he may be dismissed and discharged from the said premises in the said first count of said information specified.

JOHN S. MILLER &
MERRITT STARR,
Att'ys for Defendant.

And the said Charles H. Ingwersen, in his own proper person coming into court here, having heard the said second count of the said information read, says that the said second count of said information and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said Charles H. Ingwersen, is not bound by the law of the land to answer the same for the reason that the said second count of the said information doth not charge or state any offense under the said act of Congress therein mentioned, and because the said act of Congress and the said tax imposed thereby and the provisions of said act do not apply to the said sale or agreement of sale or agreement to sell made by the said defendant in the said second count mentioned, and because said act of Congress in the said second count mentioned and the provisions thereof therein mentioned are in violation respectively of the provisions of the Constitution of the United States and are void ; and this he is ready to verify. Wherefore, for want of sufficient information in this behalf, the said Charles

16 H. Ingwersen prays judgment and that by the court he may be dismissed and discharged from the said premises in the said second count of said information specified.

JOHN S. MILLER &
MERRITT STARR,
Att'ys for Defendant.

Endorsed: Gen. No., 2946 ; term No., —. In the U. S. district court, northern district of Ills., northern division. United States vs. Charles H. Ingwersen. Demurrer. Filed on this 2nd day of November, A. D. 1898. T. C. MacMillan, clerk. Peck, Miller & Starr, counsellors-at-law, 913-916 Monadnock block, Chicago.

And afterwards, to wit, on the 2nd day of November, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit :

THE UNITED STATES	} 2946. Vio. Int. Rev. Laws.
vs.	
CHARLES H. INGWERSEN.	

Come the parties, by their attorneys, and the defendant in his own proper person, and the defendant, by his counsel, moves the

court to quash the information filed herein against him, and, after arguments of counsel, said motion is by the court taken under advisement.

17 And afterwards, to wit, on the 2nd day of November, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES	}	2946. Vio. Int. Rev. Laws.
vs.		
CHARLES H. INGWERSEN.		

This cause coming on to be heard upon the demurrer of the defendant to the information filed herein against him, come the parties, by their attorneys, and the defendant in his own proper person, and, after hearing the arguments of counsel, said demurrer is by the court taken under advisement.

And afterwards, to wit, on the 7th day of November, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES	}	2946. Vio. Int. Rev. Laws.
vs.		
CHARLES H. INGWERSEN.		

Come the parties, by their attorneys, and the court having heretofore taken under advisement the motion of the defendant to quash the information filed herein against him, and the court being now fully advised in the premises, it is ordered that said motion be, and the same is hereby, overruled and denied; to which ruling of the court the defendant, by his counsel, excepts.

And afterwards, to wit, on the 7th day of November, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

18 THE UNITED STATES	}	2946. Vio. Int. Rev. Laws.
vs.		
CHARLES H. INGWERSEN.		

Come the parties, by their attorneys, and the court having heretofore taken under advisement the demurrer of the defendant to the information filed herein against him, and the court being now fully advised in the premises, it is ordered that said demurrer be, and the same is hereby, overruled; to which ruling of the court the defendant, by his counsel, excepts.

And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES
 vs.
 CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

Comes the United States, by John C. Black, Esq., district attorney, who declines to prosecute further in this cause as to the first count in the information filed herein; whereupon it is ordered by the court that as to said first count a *nolle prosequi* be, and the same is hereby, entered.

And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES
 vs.
 CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

Come the parties, by their attorneys, and the defendant in his own proper person, and being arraigned upon the second count of the information filed herein against him, the defendant pleads not guilty thereto, and for his defense puts himself upon the country; whereupon comes a jury of good and lawful men, to wit, Henry F. Tallman, George A. Root, John C. Turner, James M. Barnes, John Barton, Thos. J. Kirk, Bernard Horan, A. B. Cook, Charles Bordner, Alexander E. Myers, L. P. Barry, and Thomas W. Tomlinson, who are duly elected, empaneled, and sworn herein a true verdict to render according to the evidence, who, after listening to the evidence by the parties adduced, arguments of counsel, and charge of the court, retire to their room to consider of their verdict, and afterwards return into court and render their verdict, and upon their oath do say: We, the jury, find the defendant guilty as charged in the second count of the information; whereupon the defendant, by his counsel, moves the court for a new trial of this cause.

And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES
 vs.
 CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

This cause coming on to be heard upon the motion of the defendant for a new trial hereof, come the parties, by their attorneys, and the defendant in his own proper person, and after arguments of counsel and due consideration, it is ordered by the court that the said motion be, and the same is hereby, overruled; to which ruling of the court the defendant, by his counsel, duly excepts.

And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES
vs.
CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

Come the parties, by their attorneys, and the defendant in his own proper person, and the defendant, by his counsel, moves the court for a judgment in favor of the defendant *non obstante veredicto*, and after arguments of counsel and due consideration, it is ordered that said motion be, and the same is hereby, overruled; to which ruling of the court the defendant, by his counsel, duly excepts.

20 And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES
vs.
CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

This cause coming on to be heard upon the motion of the defendant in arrest of the judgment of the court herein, come the parties, by their attorneys, and the defendant in his own proper person, and after arguments of counsel and due consideration, it is ordered by the court that the said motion be, and the same is hereby, overruled; to which ruling of the court the defendant, by his counsel, duly excepted.

And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable Peter S. Grosscup, judge, to wit:

THE UNITED STATES
vs.
CHARLES H. INGWERSEN. } 2946. Vio. Int. Rev. Laws.

Come the parties, by their attorneys, and the defendant in his own proper person, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 6th day of December, A. D. 1898, one of the days of this term of this court, been adjudged guilty by a jury, in due form of law, as charged in the second count of the information filed herein against him; and, the defendant being asked by the court if he had anything to say why the sentence and the judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury, as aforesaid, that the defendant, Charles H. Ingwersen, forfeit
21 and pay to the United States a fine in the sum of five hundred dollars.

It is further ordered by the court that the said defendant stand committed to the county jail of Cook county, Illinois, until said fine is paid or he is otherwise discharged by law.

And afterwards, to wit, on the 6th day of December, A. D. 1898, there was filed in the clerk's office of the district court of the United States of America for the northern district of Illinois the defendant's petition for writ of error and supersedeas and to be admitted to bail; which said petition is in the words and figures following, to wit:

22 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court of the United States for the Northern District of Illinois, Northern Division.

UNITED STATES }
vs. } No. 2946.
CHARLES H. INGWERSEN. }

Defendant's Petition for Writ of Error and Supersedeas and to be Admitted to Bail.

The petition of Charles H. Ingwersen, defendant, sheweth unto the court that a final judgment was entered in the above-entitled cause on the sixth day of December, 1898, whereby it was adjudged that this defendant was guilty of selling certain merchandise, to wit, live stock, at a place similar to an exchange, as charged in the second count of the information herein, and it was then and there adjudged that the said acts of the defendant were contrary to the certain act of Congress in said second count of said information mentioned, and this defendant was then and there sentenced by this honorable court to pay a fine of five hundred dollars and stand committed until the same should be paid.

Your petitioner further states that he has assigned errors upon the record in said cause specifying errors, as he alleges, in
23 the record and judgment aforesaid.

He therefore prays that this honorable court will permit him to sue out a writ of error to cause the said judgment to be reviewed by the Supreme Court of the United States, and that the court will cause said writ of error to supersede said judgment and make the said writ of error a supersedeas and admit this defendant to bail during the pendency of said writ of error on such terms as may be just and according to law.

CHARLES H. INGWERSEN,
By JOHN S. MILLER AND
MERRITT STARR, *His Attorneys.*
JOHN S. MILLER,
MERRITT STARR,

Attorneys for Defendant, Plaintiff in Error.

GEORGE R. PECK,
JOHN S. MILLER,
MERRITT STARR,
Of Counsel.

Endorsed: No. 2946. U. S. vs. Charles H. Ingwersen. Defendant's petition for writ of error, &c. Filed December 6th, A. D. 1898.

And afterwards, to wit, on the 6th day of December, A. D. 1898, the following order was had and entered of record in said cause before the Honorable Peter S. Grosscup, judge, to wit:

24 THE UNITED STATES }
 vs. } 2946. Vio. Int. Rev. Laws.
 CHARLES H. INGWERSEN. }

Now, on this 6th day of December, A. D. 1898, come again the parties to this cause, the United States of America, by John C. Black, Esq., district attorney, and Charles H. Ingwersen, by Merritt Starr, his attorney, and the petition of Charles H. Ingwersen, defendant, for writ of error, and that the same be made supersedeas and to be admitted to bail, coming on to be heard, and the court, having heard the said petition and the proofs and arguments adduced and being advised in the premises, doth here now order that the writ of error issue herein, and that the same be made a supersedeas, and that the judgment herein be superseded and suspended and the defendant admitted to bail pending the hearing of said writ of error upon his filing herein a supersedeas bond conditioned according to law, with good and lawful sureties, in the sum of \$750.00, and his bill of exceptions within twenty days from this date.

And afterwards, to wit, on the 10th day of December, A. D. 1898, there was filed in the clerk's office of the district court of the United States for the northern district of Illinois a supersedeas bond; which said supersedeas bond is in the words and figures following, to wit:

25 UNITED STATES OF AMERICA, }
 Northern District of Illinois, Northern Division, } ss:

We, Charles H. Ingwersen, as principal, and Charles W. Baker and Munson P. Buel, as sureties, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of seven hundred and fifty dollars (\$750), lawful money of the said United States, to be levied of our goods and chattels, lands and tenements, if default shall be made in the conditions following:

Whereas, on the 6th day of December, A. D. 1898, at a term of the district court of the United States held in and for the northern district of Illinois, the above-named Charles H. Ingwersen was convicted on an information charging him with violating the revenue laws of the United States by unlawfully and knowingly selling and making a sale of certain merchandise, to wit, certain live stock, at a certain exchange or place similar to an exchange, to wit, at the Union stock yards at Chicago, in said northern district of Illinois, without affixing to the memorandum of said sale a United States

revenue stamp, as the revenue laws of the United States direct, and on the said 6th day of December, A. D. 1898, the said court pronounced judgment and sentence against the above-named

Charles H. Ingwersen;

26 And whereas a writ of error from such judgment has been allowed to the Supreme Court of the United States and a citation thereof signed and issued, and the said Charles H. Ingwersen having been allowed to give bail in the sum of seven hundred and fifty dollars (\$750) pending the determination of such writ of error:

Now, therefore, the condition of this obligation is such that if, upon the judgment of the Supreme Court of the United States upon such writ of error from the judgment of said district court of the United States as aforesaid, the said Charles H. Ingwersen shall personally appear before the said district court whenever and as soon as a judgment upon the mandate of the said Supreme Court shall be entered in said district court and then and there surrender himself to the marshal of the United States for the northern district of Illinois and abide the orders of the said district court and Supreme Court, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES H. INGWERSEN.

CHARLES W. BAKER.

MUNSON P. BUEL.

[SEAL.]

[SEAL.]

[SEAL.]

Approved:

P. S. GROSSCUP,

United States District Judge.

Endorsed: No. 2946. United States *vs.* Charles H. Ingwersen. Superseded-as bond. Filed Dec. 10th, A. D. 1898. T. C. MacMillan, clerk.

27 Endorsed: No. 2946. The United States *vs.* Charles H. Ingwersen. Supersedeas bond. Filed Dec. 10th, A. D. 1898. T. C. MacMillan, clerk.

And afterwards, to wit, on the 10th day of December, A. D. 1898, the assignment of errors was filed in the clerk's office of the district court of the United States for the northern district of Illinois, said assignment of errors being in the words and figures following, to wit:

28

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss :

In the District Court of the United States, Northern District of
Illinois, Northern Division.

UNITED STATES
vs.
CHARLES H. INGWERSEN. } No. 2946.

Assignment of Errors.

Now, on this 9th day of December, 1898, comes the above-named Charles H. Ingwersen, defendant, by John S. Miller and Merritt Starr, his attorneys, and says that the verdict, judgment, and sentence entered and rendered in the above-entitled action on the 6th day of December, A. D. 1898, are and each of them is erroneous and against his just rights.

And that in the foregoing record of proceedings there is manifest error in the following particulars, to wit :

First. The said information and the second count thereof, upon which said verdict, conviction, judgment, and sentence were rendered and entered, doth not charge or state any offense under the said act of Congress therein mentioned.

Second. The evidence doth not show that this defendant
29 committed any offense under the said act of Congress in said information and the second count thereof mentioned.

Third. The said act of Congress mentioned in said information and in the second count thereof and the tax imposed thereby and the provisions of said act do not apply to the said sale or agreement of sale or agreement to sell, mentioned in the said second count, or any of them.

Fourth. The evidence shows that the transaction, a sale, agreement of sale, and agreement to sell, made by said defendant, as shown by the evidence, is not within the provisions of said act of Congress in said information mentioned and is not subject to the said tax imposed thereby.

Fifth. The said act of Congress in the said second count of said information mentioned and the provisions thereof in said second count of said information mentioned are in violation respectively of the provisions of the Constitution of the United States and are void.

Sixth. The said act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and in said second count of said information mentioned, is in violation of section 8 of article 1 of the Constitution of the United States, which provides, among other things, as follows :

"ARTICLE I, SECTION 8. The Congress shall have power——

30 "First. To pay and collect taxes, duties, imposts and excises, to pay the debt, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

And this defendant says that said act of Congress imposes or purports to impose a duty, impost, and excise which is not uniform throughout the United States.

Seventh. The said act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and in said second count of said information mentioned, is in violation of section 9 of article I of the Constitution of the United States, which provides, among other things, as follows:

"ARTICLE I, SECTION 9. * * * Fourth. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

And this defendant says that said act of Congress imposes or purports to impose and lay a direct tax, which is not in proportion to the census or enumeration by said Constitution of the United States, provided for and directed to be taken.

Eighth. The said act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and in said second count of said information mentioned, is further in violation of section 9 of article I of the Constitution of the United States, which provides, among other things, as follows:

31 "ARTICLE I, SECTION 9. * * * Fifth. No tax or duty shall be laid on articles exported from any State."

And this defendant says that said act of Congress purports to lay a tax or duty upon articles exported from any State and from the State of Illinois.

Ninth. That said act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and in said second count of said information mentioned, is in violation of section 2 of article I of the Constitution of the United States, as the same is amended by the second section of the XIV amendment to said Constitution of the United States; which said section of said article I provides, among other things, as follows:

"ARTICLE I, SECTION 2. * * * Third. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons;" and which XIV amendment provides, among other things, as follows:

"ARTICLE XIV, SECTION 2. Representatives shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State, excluding

Indians not taxed ; " and this defendant says that said act of Congress purports to lay a direct tax, which is not apportioned among the several States, as required by said section 2 of article I and said XIV amendment.

Tenth. The provisions of said act of Congress approved June 13, 1898, which by said information and the second count thereof this defendant is accused of violating, are those contained in the first paragraph of section 6 of said act, reading as follows:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

And the provision of Schedule A to said act reading as follows:

"Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale, or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: Provided, that on every sale or agreement of sale, or agreement to sell, as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps, in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof, as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court."

And this defendant shows that the sale, agreement of sale, or agreement to sell, mentioned in the second count of said informa-

tion and in the evidence in this case was not made at any exchange, or board of trade, or other similar place.

Eleventh. This defendant shows that the offense of which the defendant was found and adjudged guilty by the judgment of the court, in the foregoing record set out, was the making of a sale of certain merchandise, to wit, live stock, at a place similar to an exchange or board of trade; and this defendant shows that the provisions of said act (quoted in the assignment of error numbered tenth above) under which said judgment was rendered are void for uncertainty. Said words "or other similar place" in said act contained do not define and describe any place or places or kind or kinds of place with sufficient certainty to describe or define or create any offense, or part of any offense, or impose any obligation upon this defendant.

Twelfth. The court erred in not sustaining and in overruling the motion of this defendant to quash the information and said second count thereof.

35 Thirteenth. The court erred in overruling and in not sustaining the demurrer of this defendant to said information and to the second count thereof.

Fourteenth. The court erred in sustaining the objection on behalf of the Government, viz., the United States, to the following question asked of the witness Baker by counsel for the defendant, namely, "Q. I will ask you to state, then, Mr. Baker, from your knowledge of those two places, whether the Union stock yards at Chicago, Illinois, is a board of trade, or exchange, or place similar to the board of trade."

Fifteenth. The court erred in sustaining the objection on behalf of the Government, viz., the United States, to the following question asked of the witness Baker by counsel for this defendant, namely, "Q. Is the Union stock yards, at Chicago, Illinois, a place similar to such an exchange?"

Sixteenth. The court erred in refusing to grant the request of the counsel for the defendant and give to the jury the instructions reading as follows:

"The court instructs you, gentlemen of the jury, that the act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' in so far as it purports to apply to sales, or agreements to sell, or agreements of sale, of live stock at the Union stock yards in Chicago, Illinois, conducted as the evidence shows the sales mentioned in the information were conducted, is in violation of section 8
36 of article I of the Constitution of the United States, requiring that all duties and imposts and excises shall be uniform throughout the United States, and is also in violation of section 9 of article I of the Constitution of the United States, requiring that no direct tax shall be laid unless in proportion to the census or enumeration thereinbefore directed to be taken, and that no tax or duty shall be laid upon articles exported from any State."

Seventeenth. The court erred in refusing to grant the request of

counsel for the defendant to give to the jury the instruction reading as follows :

"The court instructs you, gentlemen of the jury, that the Union stock yards in Chicago, Illinois, and the pens enclosed therein, and which have been referred to in the evidence in this cause as constituting the place at which the sales, agreements of sale, and agreements to sell, and each of them, mentioned in the information herein, were made, do not constitute an exchange or board of trade or other similar place within the meaning of Schedule A of the certain act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'"

Eighteenth. The court erred in refusing to grant the request of counsel for the defendant to give to the jury the instruction reading as follows :

37 "The court instructs you, gentlemen of the jury, that, in view of all the evidence in this case, the sales, agreements of sale, and agreements to sell, in the information mentioned, were not nor was either of them a sale, agreement of sale, or agreement to sell any products or merchandise at an exchange or board of trade or other similar place within the meaning of Schedule A of the act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'"

Nineteenth. The court erred in giving to the jury the following instruction :

"The law question in this case, gentlemen of the jury, was submitted to the court on the demurrer to the information. The only question was whether these stock yards was an exchange or a place similar to an exchange. If it was, the transactions on the stock yards are taxable under the revenue law. The court has held that it was such a place, and this proceeding is only to carry out the judgment of the court, so that an appeal can be taken and the question determined by the Supreme Court. For that reason I will instruct you that it is your duty—that the evidence in this case shows, that this defendant has filed, that the stock yards is a place similar to an exchange, and transactions on the stock yards must be evidenced by a memorandum in writing. There was such a memorandum, but it was not stamped. The failure to stamp it is a violation of the law."

38 Twentieth. The court erred in giving to the jury the following instruction :

"I instruct you to return a verdict of guilty. Is that your verdict?"

Twenty-first. The court erred in overruling the motion of the defendant to set aside the verdict and grant a new trial.

Twenty-second. The court erred in overruling the motion of this defendant that judgment be entered for the defendant, notwithstanding the verdict.

Twenty-third. The court erred in overruling the motion of the defendant in arrest of judgment, and that the judgment be arrested

Twenty-fourth. The court erred in rendering the judgment against the defendant in this cause.

Twenty-fifth. The court erred in ordering that the defendant stand committed until he should pay the fine imposed by the judgment of the court.

Twenty-sixth. And for that there are other manifest errors appearing in the said transcript and record of the proceedings in said court. Wherefore, and for each of said errors, this plaintiff in error and defendant in the court below prays this court that said judgment of the court below may be reversed, set aside, and held for naught, and for such other judgment and order in respect thereto as may be according to the law.

Respectfully submitted.

CHARLES H. INGWERSEN,
By JOHN S. MILLER AND
MERRITT STARR,

His Attorneys.

JOHN S. MILLER,
MERRITT STARR,
*Attorneys for Charles H. Ingwersen,
Defendant, Plaintiff in Error.*

GEORGE R. PECK,
JOHN S. MILLER,
MERRITT STARR,
Of Counsel.

Endorsed: No. 2946. Term No., —. In the U. S. district court, northern district of Illinois, northern division. *United States vs. C. H. Ingwersen.* Assignment of errors. Filed this 10th day of December, A. D. 1898. T. C. MacMillan, clerk. Peck, Miller & Starr, counselors-at-law, 913-916 Monadnock block, Chicago.

And afterwards, to wit, on the 10th day of December, A. D. 1898, there was filed in the clerk's office of the district court of the United States for the northern district of Illinois a bill of exceptions; which said bill of exceptions is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

In the District Court of the United States, Northern District of Illinois, Northern Division.

UNITED STATES }
vs. } No. 2946.
CHARLES H. INGWERSON. }

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the sixth day of December, A. D. 1898, being one of the days of said term of said court,

before the Honorable Peter S. Grosscup, one of the judges of said court, presiding, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

Whereupon the following proceedings were had and testimony taken.

Present: John C. Black, Esq., on behalf of the Government; Merritt Starr, Esq., representing Peck, Miller & Starr, on behalf of the defendant.

41 W. B. INGWERSEN, called as a witness on behalf of complainant, being first duly sworn, was examined in chief by General Black and testified as follows:

Q. What is your name?

A. W. B. Ingwersen.

Q. Where do you live?

A. 4919 Forestville avenue, this city.

Q. How long have you lived here?

A. Twenty-five years.

Q. Do you know Charles H. Ingwersen?

A. Yes, sir.

Q. Do you know the firm of Ingwersen Brothers?

A. Yes, sir.

Q. Are you a member of that firm?

A. No.

Q. Who constitute it?

A. The firm of Ingwersen Brothers?

Q. Yes.

A. That is H. C. Ingwersen and C. H. Ingwersen.

Q. H. C. and C. H.?

A. Yes, sir.

Q. C. H. is Charles H.?

A. Charles H.; yes, sir.

Q. Was Charles H., to your knowledge, acting as agent for Ingwersen Brothers on the 11th of August, this year?

Q. Do you know whether he made a sale on that date for Ingwersen Brothers to one Edward Egan, as agent for T. C. Eastman and Company?

A. Well, in relaity that should be Ingwersen Brothers and Smith he acted as agent for.

Q. Ingwersen Brothers and Smith it is?

A. Yes, sir; he did.

Q. Was this Edward Egan agent for T. C. Eastman and Company?

A. Yes, sir.

42 Q. Is Ingwersen Brothers and Smith a corporation under the laws of the State of Illinois?

A. It is.

Q. For the purpose of carrying on the business of a live-stock commission merchant and dealer in live stock?

A. Yes, sir.

Q. Is the T. C. Eastman Company a corporation existing under and incorporated under the laws of the State of New York?

A. Yes, sir.

Q. For the purpose of dealing in live stock?

A. It is.

Q. Now, what did Charles H. Ingwersen, as such agent as you have described, sell to one Edward Egan, as such agent as you have described, one hundred and thirty head of cattle?

A. He did.

Q. Do you remember their weight? Was it 186,170 pounds?

A. Yes, sir; I think it was.

Q. To your best knowledge, was that the weight?

A. Yes, sir.

Q. Do you remember the price paid per hundred pounds for that live stock?

A. Yes, sir.

Q. What was it?

A. Five thirty-five per hundred pounds.

Q. Did this sale embrace any other property?

A. Well, yes, there were sixteen head and six head.

Q. Six head. Do you remember the weight of the six head?

A. No, I don't.

Q. Is it your best recollection that they weighed 7,830 pounds?

A. Yes, sir.

Q. Do you remember the price at which they were sold?

43 A. I think five cents; five dollars per hundred.

Q. Four seventy-five per hundred?

A. Yes, sir; that is right.

Q. What sort of sale was this—for present delivery or for future?

A. For present delivery.

Q. Had these cattle and merchandise lately been consigned to Ingwersen Brothers and Smith?

A. Yes, sir.

Q. Upon commission for account of the owner?

A. Yes, sir.

Q. Do you remember his name?

A. Yes, sir.

Q. Give it.

A. A. B. Bell.

Q. Where did he reside?

A. Ida Grove, Iowa.

Q. Was the merchandise so sold delivered?

A. Yes, sir.

Q. In pursuance of the sale then and there?

A. Yes, sir.

Q. Between the commission merchants and the brokers you have mentioned?

A. Yes, sir.

Q. Where did this delivery and sale take place?

A. At the Union stock yards.

Q. State whether or not any memorandum or evidence of the sale was reduced to writing?

A. Yes, sir; there was a memorandum made.

Q. Of this sale?

A. Yes, sir.

Q. Identify, if you can, the ticket that you speak of or the memorandum.

(Witness hands memorandum to counsel.)

General BLACK: If your honor please, I will have to go and get the statute. I don't know about this.

44 Q. Do you know one David Moog?

A. Yes, sir.

Q. Are you aware of a sale made by Charles H. Ingwersen to one David Moog?

A. I am.

Q. On October 14, 1898?

A. Yes, sir.

Q. Where did that sale take place?

A. At the Union stock yards.

Q. What did it consist of?

A. Nineteen cattle; weight, 22,280 pounds, at five twenty-five per hundred.

Q. Do you know whether or not any written memorandum was made of that sale?

A. No, I do not.

Q. Examine the article that I now show you and then make your answer (handing paper to witness).

A. This memorandum is made by the stock yards company. I do not know as any memorandum further than this was made by our firm.

Q. Was that made by your firm?

A. No, sir; that is made by the Union Stock Yards and Transit Company.

Q. Was it made for your firm?

A. Yes, sir.

Q. Was it delivered to your firm or by your firm to Moog?

A. It was.

Q. At the time of the sale?

A. Yes, sir.

Q. Was it sold for present delivery?

A. It was.

Q. What was the price agreed upon?

A. Five twenty-five per hundred pounds.

Q. What was the total weight of the cattle sold?

A. 22,280.

Q. How many head of cattle were there involved?

45 A. Nineteen cattle.

Q. Had that stock been consigned to Ingwersen Brothers and Smith?

A. It had.

Q. For sale on commission?

A. Yes, sir.

Q. On whose account?

A. On account of H. Hughes, Victor, Iowa.

Q. Of Hardwick or Victor?

A. Probably it was shipped from Hardwick. The gentleman lives at Victor.

Q. Was the merchandise and cattle delivered on that sale?

A. It was.

Q. To said Moog?

A. Yes, sir.

Q. Where did all this take place?

A. At the Union stock yards, Chicago.

The COURT: Did he say there was no memorandum by either seller or buyer?

General BLACK: He said this memorandum was made——

The COURT: Oh, yes; I understood him to say that was made by the stock yards company. Was there any memorandum made by the seller or buyer?

The WITNESS: Not that I know of.

General BLACK: Other than this?

The COURT: Would he be in a position to know?

The WITNESS: Yes, sir; I would be in a position to know.

46 The COURT: There is no stamp on that one, then?

Q. After its execution, to whom was this memorandum handed by the weighmaster?

A. That was handed to Ingwerson Brothers and Smith.

Q. Was that there upon their memorandum?

A. Yes, sir.

Q. Is that in accordance with the usage of the stock yards company?

A. It is.

Q. Did they thereupon deliver this to Moog?

A. Yes, sir.

Q. It was their own memorandum, then, of delivery to Moog of this sale?

A. Yes.

Q. Do you know as a matter of fact whether they declined and refused to stamp that in pursuance of the revenue act?

A. I do.

The COURT: Did they refuse to?

The WITNESS: They refused to stamp that.

General BLACK: I offer that in evidence, your honor.

The COURT: Very well.

General BLACK: Gentlemen of the jury, the following is offered in evidence:

"Div. D, Union Stock Yards and Transit Co., scale 5.

"CHICAGO, 10, 14, 1898.

"I hereby certify that I have this day weighed from Ingwerson Bros. S. to D. Moog, 19 cattle, 22,280 lbs., 5 $\frac{1}{4}$, 1,169.70.

"SIBLEY,

"Weighmaster."

47 General BLACK (to the jury): You will observe that it is not stamped.

Q. I want to go back to this first memorandum for one minute. Was this delivered to Eastman and Company?

A. It was delivered to their agent, E. Egan.

General BLACK: Your honor, I will have to enter a *nolle* as to the first count of this information. That leaves the case upon the second count.

The COURT: Very well.

No cross-examination.

C. W. BAKER, called as a witness on behalf of the complainant, being first duly sworn, was examined in chief by General Black and testified as follows:

Q. Mr. Baker, what is your residence, age, and occupation?

A. Chicago, Illinois; age, forty-two; engaged in the live-stock business at the Union stock yards, Chicago, Illinois.

Q. How long have you been engaged at the stock yards in business?

A. Twenty-odd years.

Q. I will get you to read to the jury Exhibit A, attached to this information, and state, if to your knowledge it is true description of the Union stock yards—a material description.

A. (Reading:)

"EXHIBIT A.

48 "The Union stock yards described in this information, at the respective times therein mentioned and theretofore and since, covered and cover 335 acres of land situated between 39th street and 47th street and Halsted street and Ashland avenue, in the city of Chicago, in the county of Cook and State of Illinois, of which 200 acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand, and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the city of Chicago, extend into the yards, over which cattle, hogs, and other live stock received at or shipped from the Union stock yards are carried. Upon the arrival of cattle, hogs, or

other live stock at the Union stock yards consigned to the commission merchant at the Union stock yards, such cattle, hogs, or other live stock are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are there cared for, fed, and watered by such owner or consignee. Any person is at liberty to send, take, or receive cattle, hogs, or
49 other live stock into the Union stock yards, and there place, or have the same placed, in a pen or pens, care for the same, and there sell any cattle belonging to him or which he had the right to sell. Any person has access to the pens containing cattle, hogs, or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs, and other live stock in the yards are at private sale.

"Commission merchants having cattle, hogs, or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found take him to the pens in which such live stock is contained, and there exhibit such live stock, and to such proposed buyer or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs, and sheep in the yards are by weight, and upon a sale thereof being made, such live stock is taken by the owner, or commission merchant having charge thereof, from the pen in which it is confined to a scale or scales in the yards and belonging to the Union Stock Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company and in charge of
50 the scale in which said live stock are weighed, and the weight of such live stock is thereby determined as the weight for which the purchaser pays upon his purchase, and the amount of the purchase price at the price per pound or per hundred pounds fixed in such sale is thereby determined."

Yes, sir; that is a correct statement.

The COURT: That is the method of doing business in the stock yards, is it?

The WITNESS: That is, substantially.

The COURT: And a correct description of the stock yards?

The WITNESS: Yes, sir; so far as it goes.

Gen. BLACK: Will it be admitted upon the hearing of this cause that Exhibit B, attached to the information, is a correct copy of the charter and by-laws of the Union Stock Yards and Transit Company of Chicago?

Mr. STARR: Yes, sir.

Q. Is that a correct copy of the charter and by-laws?

The COURT: Any more particular proof is waived.

A. Yes, sir; I think it is.

Gen. BLACK: That is our case, your honor.

51 Cross-examination.

By Mr. STARR:

Q. Mr. Baker, do I understand you to say you are acquainted with the conditions of business at the stock yards?

A. Yes, sir.

Q. I will ask you to state whether you are acquainted with business on boards of trade and on the Chicago board of trade.

A. Somewhat; yes, sir.

Q. Had some experience there?

A. I was on the board for a number of years before going to the stock yards.

Q. I will ask you now to give us a short general description of the method of doing business on the board of trade.

A. Well, there are a number of lines of business that are done on the board.

Q. What kind of a place is it?

A. The board of trade is a room or hall provided by the chamber of commerce, I believe—it was when I was there—in which are congregated all the members and their duly accredited employés.

Q. What do they do there?

A. They engage in the business of buying and selling cereals and provisions; in the case of cereals, in some instances, by samples, and in buying and trading, in the case of provisions, by option trading, trading in futures.

Q. Do they have the goods which are the subject of the sale there present at the exchange or board of trade?

A. They do not.

52 Q. How is it at the stock yards, do they have the goods which are the subject of the transaction present at the place?

A. In every instance.

Q. You spoke, Mr. Baker, of this hall of the board of trade being open to the members of the board of trade and to their duly accredited employés. I will ask you to state whether the hall of the board of trade or floor where their trades are carried on is open to the public.

A. It is not.

Q. I will ask you to state what the fact is as to the Union stock yards and their pens for the purposes of trading.

A. It is open to and visited by people from all portions of the world.

Q. You say visited?

A. Yes, sir; visited. I would not want to say that people from all over the world dealt there, but anybody is at liberty to deal there; it don't make any difference where he comes from.

Q. Either as a buyer or as a seller of live stock?

A. Yes, sir.

Q. What is the fact as to such liberty existing or not on the board of trade?

A. Such liberty does not exist on the board.

Q. What is the condition at the board of trade in that respect?

A. Any business transacted on the board of trade must be transacted by or through a member of the board.

Q. What constitutes a member or membership on the board of trade? How does a person get that?

53 A. Makes application in form prescribed by the directors, is balloted upon by the board of directors, and if elected signs the constitution and by-laws, and either takes out a new membership or has an unforfeited membership transferred to him in his name and signs an agreement to abide by all the rules and regulations governing members.

Q. Does a member pay an initiation fee?

A. He does in case of the purchase of a new membership.

Q. Do you remember what that is?

A. I do not now; I could not state, sir.

Q. To the best of your recollection, what was it at the time when you were on the board?

A. I think it was five hundred dollars then.

Q. Five hundred dollars?

A. This was quite a number of years ago; twenty years ago.

Q. You spoke of membership certificates being transferred by a man who has one to some one else who wishes to become one. I will ask you to state whether such memberships are saleable and transferable for money?

A. Yes, sir.

Q. Have a market value of themselves?

A. Yes, sir.

Q. Is there any such thing as having a membership in the Union Stock Yards Company?

A. No, sir.

Q. I will ask you to state, then, Mr. Baker, from your knowledge of these two places, whether the Union stock yards at Chicago, Illinois, is a board of trade or exchange, or place similar to the board of trade.

54

General BLACK: I object to the question.

The COURT: The objection is sustained.

To which ruling of the court defendant, by his counsel, then and there excepted and still excepts.

Q. In order to place each of the different questions by itself, I will ask you to state whether, from your knowledge as a merchant in Chicago and a man engaged in these lines of business, you know what an exchange is; you can tell us what an exchange is? A place for doing business?

General BLACK: I object to that question.

The COURT: Well, if he knows what an exchange is, he may give us the facts as to what an exchange is. He may give us the facts. I had supposed he had done that.

Mr. STARR: I will supplement that question and add to the question as it stands, this:

Q. Is the description which you have given of the board of trade a fair description of an exchange?

General BLACK : I object.

The COURT : I will let him answer that question.

A. In my opinion, it is.

Q. Is the Union stock yards at Chicago, Illinois, a place similar to such an exchange?

General BLACK : I object.

55 The COURT : I think that is a matter for the jury to determine on the facts. I will sustain the objection.

Mr. STARR : I offer his testimony as an expert. It is understood, General Black, that the rulings of the court, so far as they go, are excepted to, and we will be allowed to preserve our exceptions.

To which last ruling of the court the defendant, by his counsel, then and there excepted and still excepts.

Q. You have stated that the Union stock yards are open to the world, and that the board of trade is a privileged place. You have stated that at the stock yards the goods which are dealt in are present on the spot, and that they are not so at the board of trade. I will ask you to state, Mr. Baker, whether on the board of trade either the board of trade itself or the merchants who deal thereon have a responsibility for the care and safe keeping of the property dealt in while it is the subject of the deal?

General BLACK : Objected to.

The COURT : Objection overruled.

A. No ; they have not.

Q. What is the fact as to the responsibility for the care and safe keeping of the property dealt in at the stock yards?

General BLACK : The same objection.

The COURT : Objection overruled.

56 A. The commission man, receiver, or consignee is responsible for the custody and care of the stock.

Q. I will ask you whether the care of the stock implies special duties and responsibilities ; if so, what are they ?

General BLACK : I object to that.

A. To feed and care for them and see that they do not get sick.

Q. Who feeds and cares for the cattle at the stock yards ?

A. The commission man—consignee.

Q. He sees that they are fed, watered, and cared for ?

A. Personally attends to it.

Q. Personally attends to that ?

A. Yes, sir.

Q. That is part of his duty at the yards ?

A. Yes, sir.

Q. Is there any duty corresponding to that that falls on the merchant on the board of trade ?

A. There is not.

Q. I will ask you, Mr. Baker, to describe—you have stated that the board of trade is a hall or floor. How big a place is it?

A. I am not much of an architect, but I should say two hundred by three hundred feet square.

Q. That is the outside dimensions of the building?

A. Yes, sir.

Q. And the hall itself in which the trading goes on is, say, half that?

A. Just about, I guess.

Q. Well, then, are the trades on the board of trade carried on orally and within earshot of each other all the time?

57 A. They are within the confines of what is known as the exchange or board of trade hall.

Q. You have already given the dimensions of the stock yards?

A. No; I think not.

General BLACK: In the exhibit?

The WITNESS: Oh, yes.

Q. Is there any consumption of the goods dealt in at the board of trade on the board?

A. No, sir.

Q. Is there any consumption of the goods dealt in at the stock yards, there in the yards?

A. Yes, sir.

Q. What was it—what consumption goes on of goods dealt in at the stock yards?

A. Probably one-half of the receipts of the Union stock yards. Live stock is taken, immediately upon its purchase by the buyer stationed at the said yards, to the packing-houses or abattoirs located at said yards and there slaughtered and dressed ready for consumption.

Q. Then the keeping and care—feeding and watering of the live stock—is that a responsibility incident to the consumption of the live stock there at the yards?

A. It is.

The COURT: Also to the transshipment?

The WITNESS: Yes, sir.

The COURT: As to the other half of it?

The WITNESS: I said about one-half of it, your honor, I think.

Q. Is there anything corresponding to that on the board of trade?

A. There is not.

58 The COURT: No watering of stock on the board of trade?

The WITNESS: There wasn't when I was there.

Mr. STARR: That is all.

Redirect examination.

By General BLACK:

Q. Mr. Baker, do you know of trades on the board that do not involve the ownership of the property traded in? I mean legally. Do you know of any broker selling stuff he don't have?

A. Yes, sir.

The COURT: Where; on the board of trade or the stock yards?

The WITNESS: The board of trade.

Q. Is it not a fact that he is presumed at the time he makes the trade that he has got the stuff?

A. There is such a presumption; yes, sir.

Q. That is all a presumption?

Mr. STARR: I object to his cross-examining the witness as to presumptions of law.

Q. I mean that is something that goes with the trade. If a man offers five thousand bushels of oats, and it is bought by another man on the board of trade, it is the understanding in law between those two, isn't it, that he has got it?

Mr. STARR: I object to what is understood in law.

The COURT: Certainly.

Mr. STARR: It isn't understood so at all.

59 General BLACK: Are you testifying?

Mr. STARR: I am as to what the presumptions of law are. I think you and I are better judges of that than Mr. Baker is.

The COURT: I don't quite see the importance of it.

General BLACK: It may not be important, yet I would like to have it in the record. I think it is a good deal of importance.

Q. Are there not many sales take place on the board where the stuff is really owned by the party undertaking to sell—pretending to sell—undertaking to sell?

A. Very seldom, I think.

Q. Doesn't it happen very often?

A. No; I think it is very seldom.

Q. Do you mean to say the sales are all stuff that doesn't really exist?

A. No—excuse me; I didn't understand your question. You say sales by the party that own the stuff?

Q. Yes; they own the stuff very frequently.

The COURT: Don't warehouse people sometimes sell on the board of trade, men who have stock in the warehouses?

A. They may in some instances, but that is not the bulk of the trade.

Q. I am not asking you for the bulk of the trade.

A. That is what I was—

60 Q. Don't it very often happen that men sell there when they have got the stuff to sell?

A. Yes.

Q. And men buy when they buy the stuff that is sold?

A. Yes.

Q. Isn't it true, in regard to these warehouse certificates, they each, every one of them, represent actual grain?

A. Yes, sir.

Q. So that very many of the transactions that take place on the

board of trade are transactions for present delivery of actual stuff by certificate of its warehousing?

A. Yes; that is correct.

Q. Now, you stated that there — no sales of stuff in the stock yards—I want you to be careful about this—that there were no sales of stuff in the stock yards that wasn't actually there?

A. No live stock.

Q. Is it true that there are sales going on there of produce or provisions, whatever it may be, where the stuff is not actually in sight, between the buyers? Don't men sometimes sell stuff by samples of the stuff on hand?

A. No, sir.

Q. You don't know of it?

A. Never.

Q. You do not know that that is true?

A. I know it is not true.

Q. That they never buy nor sell stuff by sample of lots on hand, so many bullocks of such a grade?

A. No, sir.

Q. A man from Colorado, coming in here with a herd of cattle, would not agree to deliver one hundred head of the same
61 grade on a later date?

A. No, sir.

Q. You know that?

A. Yes, sir.

Q. Are you familiar with any men from Colorado who have been making sales there?

A. I know a good many from there.

Q. Do you know of any that are making sales of any kind?

A. Of such a kind?

Q. Yes.

A. No, sir.

Q. Or of any kind?

A. I don't know as I can call their names off-hand. I know a good many shippers from Colorado.

Q. You said, in answer to a question that was put to you, that there was no delivery of stuff on the board of trade. That is not true, is it?

A. No delivery of stuff?

Q. Yes.

A. I do not know that I understand that question.

Q. That was what you said in answer to Mr. Starr, that there was no delivery.

The COURT: What you meant was no manual delivery on the board.

A. I do not know what the question was. It may have been in regard to option trading.

Q. No; that wasn't in regard to option trading. You said there was no delivery of stuff on the board.

A. No actual delivery.

Q. There is a delivery of certificates?

62 A. In some instances there is a delivery of the certificates representing the stuff.

Q. This matter of consumption in the stock yards of the stuff sold there, it is taken out from where the sales are made, is it not? A man buys stuff to slaughter, he takes it away from where it is bought?

A. Yes, sir; it is only a few hundred yards.

Q. If he wants to ship it, he takes it away?

A. Yes, sir.

Q. If he buys grain on the board of trade, he takes his certificate and takes it away to ship?

A. He must take it to some transportation company.

Q. So that they are just about alike?

A. I do not think so.

Q. They do the same thing, don't they?

A. I do not think they do.

The COURT: The facts are what we are after here, not the argument.

Q. Just one other question. I understood you to say that trading on the board of trade was within ear-shot and hearing substantially of everybody within the hall. Did you so state?

A. Of those who might desire to hear who were in the hall.

Q. Were you ever there when the pit was pretty lively?

A. Yes; I have been.

Q. Have you been able to hear yourself, let alone your next-door neighbor?

63 A. If I was inclined to hear something; if a man wanted to sell me something at less than I was bidding.

Q. You had to pay pretty close attention?

A. Yes; that is very true.

Q. And the trade, after all, was between you and the man that traded with you?

A. Yes; except a man might be listening.

Q. Not as a participant?

A. No, sir.

Q. Individual trades are just the same as they are down on the stock yards?

A. No. It was my intention to convey this: Sales on the board of trade are public sales—that is, any member or his employé, if present or having the desire to, may hear the sales. Sales at the stock yards are private sales.

Q. But if a man is engaged in it and his employés want to hear it they can, can't they?

A. No, sir.

Q. Why?

A. Because they don't allow it, buyers and sellers.

Q. Can't a couple of men go off in a corner on the board of trade and make the same sale?

A. They can, but they don't.

Q. If they want to, down in the stock yards, they can enlighten their employes and friends of the contents of the trade?

A. Yes, sir; nothing to prevent.

The COURT: What number of cattle are brought into these stock yards every year?

The WITNESS: Two and one-half million cattle and eight million hogs last year, I think.

64 The COURT: What proportion of the production of this western country is that?

The WITNESS: Well, I should be pleased to furnish the court some figures on the subject. I wouldn't want to answer it off-hand.

The COURT: I mean only approximately.

The WITNESS (after computation): Oh, one-fifteenth.

The COURT: Is there any other yard where so many cattle and hogs are sold?

The WITNESS: No, sir.

The COURT: It is the largest in that respect in the country?

The WITNESS: The largest stock yards in the world; yes, sir.

The COURT: About how many commission merchants are there at the stock yards?

The WITNESS: One hundred and ten firms; each firm is composed of one or more.

The COURT: How are they quartered there?

The WITNESS: They rent offices from the Union Stock Yards and Transit Company, who have provided an exchange building, located in the center of the yards.

The COURT: They are all in one building?

65 The WITNESS: Yes, sir.

The COURT: What proportion of these animals that are brought in are bought by the commission men?

The WITNESS: A very small proportion; I should say probably five to ten per cent. And in making that statement I wish to say that all the class, I think, that commission men buy are such as are known as stockers and feeders, which they purchase for their customers to take back into the country. In other words, a countryman will bring two loads of cattle to the stock yards to his commission man for sale, to handle. The countryman desiring to place more cattle on feed, he goes, in company with his commission man, to what are known as the stocker pens, feeder pens, and there buys some thin cattle and takes them back to his farm to feed them.

The COURT: Who buys the fat cattle?

The WITNESS: The eastern buyers located at Chicago and the slaughterers.

The COURT: How are the eastern buyers represented?

The WITNESS: They have their regular representatives here.

The COURT: Commission men?

The WITNESS: No, sir; they have——

The COURT: They have offices, too?

66 The WITNESS: Yes, sir.

The COURT: In the same building?

The WITNESS: Yes, sir.

The COURT: And they watch the shipments of the animals as they come in, and make their purchases?

The WITNESS: Yes, sir. The custom is, for a commission man who receives the live stock, if he is a judge of his business—when he receives ten car-loads of live stock, he knows about what class of buyers will handle each class, and he goes himself with his buyer, takes him to certain pens till he gets a certain price.

The COURT: What proportion of these animals are shipped to commission men?

The WITNESS: Oh, practically all—practically all.

The COURT: The commission men who have their offices in that building?

The WITNESS: Yes, sir.

The COURT: Is it a rare thing for the owner to bring in his own shipment?

The WITNESS: He very frequently consigns his stock to himself, then turns it over to a commission man for sale. In some few isolated instances sells it himself.

67 The COURT: So that really those one hundred and ten commission firms who occupy offices out there buy up the cattle over the country and sell it to the eastern buyer whose representative is there, and to the slaughter-houses?

The WITNESS: No; they receive it and sell it on commission.

The COURT: Yes—I mean they receive the cattle.

The WITNESS: Yes, sir.

The COURT: And sell it to those eastern houses?

The WITNESS: Yes, sir.

The COURT: And to the slaughterers?

The WITNESS: Yes, sir.

The COURT: That practically constitutes their business at the yards?

The WITNESS: Yes, sir; of course, there is some speculation there, as there always is around such market centers.

The COURT: Well, I do not think of anything else myself.

Recross-examination by Mr. STARR:

Q. Mr. Baker, let me ask you if a farmer from central Illinois should come up with a couple of hundred head of hogs, his own property, having them consigned to himself at the stock
68 yards, would they be taken any care of at the stock yards, even although the yards never had heard of him before?

A. Yes, sir.

Q. If he were to meet a buyer from Montreal, Canada, who paid him the currency for those hogs and took them away, would such a trade happen without the intervention of any commission man?

A. Yes, sir.

Q. Do such trades sometimes happen?

A. Yes, sir.

The COURT: How do the farmers get into the stock yards—what sort of application do they have to make to get in?

The WITNESS: None whatever, your honor. The farmer's live stock would be consigned to the stock yards. Take two cars of hogs, for instance, the stock yards company would receive that stock from the railroad company, place it in a suitable pen, and lock it up until the owner had identified himself and paid the freight charges. Then the stock would be turned over to him, then the gate would be unlocked, and he could sell to the buyers, effect a sale, constitute a delivery by the weighing of the stock.

The COURT: Is the stock yards also the owner of this terminal road that goes to the stock yards from the different railways?

The WITNESS: I believe the same stockholders are interested in both companies.

69 The COURT: Different companies?

The WITNESS: Yes, sir.

Q. You spoke, Mr. Baker, of a man going to the stocker pens and buying lean stock and shipping it out to a farm for the purpose of fattening; then, perhaps, he would ship it to Chicago to the yards for sale. I will have to ask you to take that transaction from its beginning and describe the operations that it would go through, the number of payments of money that would be made in the ordinary course of business in the handling of that stock from the time it is bought and shipped out to the farm, fattened; the buyer then consults the market, either by mail or by telegraph, until he finds the market suitable for his purposes for his sale, then ships it back, makes his sale of the stock, and gets his pay and deposits his money in the bank; just describe the number of operations he would go through.

General BLACK: Why not let your statement stand as his answer?

Mr. STARR: I thank the General for his suggestion.

Q. You may add to that by reference to the revenue law the number of times its stamp duties would be paid on the handling of that stock.

General BLACK: I will object to that as a matter of law.

The COURT: No; that part of it I will exclude.

70 Mr. STARR: Go on without that part of it; apply that after his other answer is in.

The COURT: There isn't more than one sale. Well, go on and describe the process.

A. From the time the countryman sells his fat cattle here in the yards, he goes with his commission man to the stocker pens and buys one or more loads of cattle as he sees fit. Those cattle are weighed and delivered to his commission man in the ordinary course of business. The commission man then delivers those cattle or the stock yards company delivers those cattle to the railway company, where they are placed on the cars and sent out to the home of the countryman.

Q. Bills of lading issued by the railroad company?

A. Oh, yes, sir; and bills of lading are issued, telegrams are sent, etc. The countryman takes those cattle and places them on his farm, on suitable feeding lots, and proceeds to feed and water the

cattle until they become ripened or fit for market. He wires his commission man perhaps on two or three different occasions before as to the condition of the market before he——

General BLACK: This is so clearly a hypothetical answer that I do not think it ought to go into the record.

The COURT: I do not see how it is going to help us any.
71 It may illustrate how the Government collects its taxes. I had occasion to sell a little property in the form of securities myself not long ago, and I found before I had sent all the telegrams connected with it, made a note or two, and drawn two or three checks, that I had paid the Government a good deal of money, too.

The WITNESS: I think, your honor, in this one transaction, I think there is some seventeen different taxes.

The above and foregoing is all the evidence offered or received on the hearing of this cause.

And thereupon the defendant moved the court and offered the motion that the court give the jury the following instruction, to wit:

The court instructs you, gentlemen of the jury, that, in view of all the evidence in this case, the sales, agreements of sale, and agreements to sell, in the information mentioned, were not nor was either of them a sale, agreement of sale, or agreement to sell any products or merchandise at an exchange or board of trade or other similar place within the meaning of Schedule A of the act of Congress approved June 13, 1898, entitled "An act to provide ways and
72 means to meet war expenditures, and for other purposes."

But the court refused to give the said instruction.

To which refusal of the court the defendant, by his counsel, then and there duly excepted and still excepts.

And thereupon the defendant, by his counsel, moved the court to give to the jury the following instruction:

"The court instructs you, gentlemen of the jury, that the Union stock yards in Chicago, Illinois, and the pens enclosed therein, and which have been referred to in the evidence in this cause as constituting the place at which sales, agreements of sale, and agreements to sell, and each of them, mentioned in the information herein, were made, do not constitute an exchange or board of trade or other similar place within the meaning of Schedule A of the certain act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'"

But the court refused to give the said instruction.

To which refusal of the court the defendant, by his counsel, then and there duly excepted and still excepts.

And thereupon the defendant, by his counsel, moved the
73 court to give the jury the following instruction:

"The court instructs you, gentlemen of the jury, that the act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' in so far as it purports to apply to sales or agreements to sell or

agreements of sale of live stock at the Union stock yards, Chicago, Illinois, conducted as the evidence shows the sales mentioned in the information were conducted, is in violation of section 8 of article I of the Constitution of the United States, requiring that all duties and imposts and excises shall be uniform throughout the United States, and is also in violation of section 9 of article I of the Constitution of the United States, requiring that no direct tax shall be laid unless in proportion to the census or enumeration thereinbefore directed to be taken, and that no tax or duty shall be laid upon articles exported from any State."

But the court refused to give the said instruction.

To which refusal of the court the defendant, by his counsel, then and there duly excepted and still excepts.

74 And thereupon the court instructed the jury as follows:

"The law question in this case, gentlemen of the jury, was submitted to the court on the demurrer to the information. The only question was whether these stock yards was an exchange or a place similar to an exchange. If it was, the transactions on the stock yards are taxable under the revenue law. The court has held that it was such a place, and this proceeding is only to carry out the judgment of the court, so that an appeal can be taken and the question determined by the supreme court. For that reason I will instruct you that it is your duty—that the evidence in this case shows that this defendant has violated the law; that the stock yards is a place similar to an exchange, and transactions on the stock yards must be evidenced by a memorandum in writing. There was such a memorandum, but it was not stamped. The failure to stamp it is a violation of the law."

To the giving of which instruction the defendant, by his counsel, then and there duly excepted and still excepts.

And thereupon the following proceedings occurred:

The Court: I instruct you, gentlemen of the jury, to return a verdict of guilty. Is that your verdict?

To which instruction and ruling of the court the defendant, by his counsel, then and there duly excepted and still excepts.

And the verdict as instructed by the court was accordingly entered.

General BLACK: As to the second count.

The Court: The other is nolle now.

And thereupon the defendant, by his counsel, entered a motion for a new trial and moved the court to set aside the verdict and grant a new trial.

Which motion the court then and there overruled.

To which ruling of the court in overruling said motion the defendant, by his counsel, then and there duly excepted and still excepts.

And thereupon defendant, by his counsel, moved the court that judgment be entered for the defendant, notwithstanding the verdict.

Which motion the court then and there overruled.

To which ruling of the court in overruling said motion the defendant, by his counsel, then and there duly excepted and still excepts.

76 Thereupon the defendant, by his counsel, then and there moved the court in arrest of judgment and that judgment be arrested.

Which motion the court then and there overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted and still excepts.

And thereupon the court rendered the judgment herein, which appears at large elsewhere in the record.

To the said judgment and the action of the court in rendering the same the defendant, by his counsel, then and there duly excepted and still excepts.

And thereupon the following proceedings occurred, to wit, the court addressed the counsel for the defendant and said:

The COURT: If you want to appeal, the supersedeas bond will be seven hundred and fifty dollars.

General BLACK: The order is he stands committed until the fine is paid?

The COURT: Yes.

To which ruling and order of the court the defendant, by his counsel, then and there duly excepted and still excepts.

Mr. STARR: We pray for a writ of error, and the court says it may issue and be made a supersedeas upon filing a bill of exceptions and supersedeas bond within twenty days in the sum of seven hundred and fifty dollars. Is that right?

77

The COURT: Yes.

And because the matters aforesaid do not fully appear of record the defendant presents this his bill of exception, and prays that the same may be signed and sealed by the judge of this court pursuant to the statute, etc., which is accordingly done.

P. S. GROSSCUP, *Judge*.

Endorsed: Gen. No., 2946; Term No., —. In the United States district court, northern district of Illinois, northern division. United States vs. Charles H. Ingwersen. Bill of exceptions. Filed this 10th day of December, A. D. 1898. T. C. MacMillan. Peck, Miller & Starr, counselors-at-law, 913-916 Monadnock block, Chicago.

And afterwards, to wit, on the 10th day of December, A. D. 1898, the assignment of errors was filed in the clerk's office of the district court of the United States for the northern district of Illinois, said assignment of errors being in the words and figures following, to wit:

78 NORTHERN DISTRICT OF ILLINOIS, }
 Northern Division.

I, T. C. MacMillan, clerk of the district court of the United States of America for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of the proceedings had in said court in case No. 2946, wherein The United States of America is the plaintiff and Charles H. Ingwersen is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Dist. Court U. S.,
Northern Dist. Illinois,
1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 10th day of December, A. D. 1898.

T. C. MACMILLAN, *Clerk,*
By C. R. PICKARD,
Deputy Clerk.

79 UNITED STATES OF AMERICA, 38 :

The President of the United States to the honorable the judges of the district court of the United States for the northern district of Illinois, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States of America, as plaintiff, and Charles H. Ingwersen, as defendant, a manifest error hath happened, to the great damage of the said Charles H. Ingwersen, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States
for the Northern Dist. of Illinois.

Allowed by—

P. S. GROSSCUP,
District Judge.

80 [Endorsed:] Supreme Court of the United States. —
 — vs. ——. Writ of error. Filed Dec. 10th, 1898.
 T. C. MacMillan, clerk. Copy deposited for the defendant in error
 in the clerk's office, U. S. district court, northern district of Illinois.

NORTHERN DISTRICT OF ILLINOIS, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing-entitled cause this 10th day of December, A. D. 1898.

T. C. MACMILLAN,
*Clerk United States District Court,
 Northern District of Illinois.*

81 UNITED STATES OF AMERICA, ss:

The President of the United States to the United States of America,
 Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States in and for the northern district of Illinois in the northern division thereof, wherein Charles H. Ingwersen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable P. S. Grosscup, judge of the district court of the United States for the northern district of Illinois, this tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

P. S. GROSSCUP,
United States District Judge.

Notice rec'd & accepted.

JOHN C. BLACK,
U. S. Att'y, N. D. Ills.

82 [Endorsed:] Supreme Court of the United States. —
 — vs. ——. Citation. Filed Dec. 10th, 1898. T. C.
 MacMillan, clerk.

On this tenth (10th) day of December, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Merritt Starr before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Honorable John C. Black

United States district attorney in and for the northern district of Illinois.

MERRITT STARR.

Sworn to and subscribed the 10th day of December, A. D. 1898.

C. R. PICKARD,

U. S. Commissioner, Nor. Dist. Illinois.

Endorsed on cover: File No. 17,221. N. Illinois D. C. U. S. Term No., 636. Charles H. Ingwersen, plaintiff in error, *vs.* The United States. Filed December 13th, 1898.

THE SUPREME COURT OF THE UNITED STATES

IN EXAMINATION OF THE RECORDS OF THE

OFFICE OF THE SECRETARY OF THE INTERIOR
IN CONNECTION WITH THE

LANDS OF THE UNITED STATES

OF 1878

Printed by the Government Printing Office, Washington, D. C. 1878

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 4, Original.

EX PARTE: IN THE MATTER OF THE PETITION
OF GEORGE R. NICHOLS FOR A WRIT OF
HABEAS CORPUS.

And now comes George R. Nichols, by Henry S. Robbins, his counsel, and presents the petition of the said Mr. Nichols for a writ of *habeas corpus* to issue to John Ames, United States marshal for the northern district of Illinois, and upon said petition moves the court for leave to file the same and for the entry of a rule thereon requiring said Ames to show cause within five days from the date hereof why a writ of *habeas corpus* should not issue as prayed in said petition, and that pending a hearing herein said Nichols be released upon his filing in this court a bond or recognizance in the penal sum of one thousand dollars, to be approved by the clerk of this court, and conditioned that said Nichols will surrender himself whenever so ordered by this court, and will otherwise abide by the order of this court in the premises.

GEORGE R. NICHOLS,
By HENRY S. ROBBINS,
His Counsel.

JOHN G. CARLISLE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF
AMERICA.

*To the Honorable Judges of the Supreme Court of the United
States of America :*

Your petitioner, George R. Nichols, of the city of Chicago and State of Illinois, complaining, shows that he is unjustly and unlawfully detained and imprisoned by John Ames, United States marshal for the northern district of Illinois, by virtue of a certain order or warrant of commitment, a copy of which is hereto annexed as "Exhibit A;" which order was issued under the following circumstances:

Your petitioner is a citizen of the United States and has been a citizen of the State of Illinois for more than twenty years; that your petitioner had for some years prior to the fourth day of October, 1898, been and then was a member of the Chicago Board of Trade, a commercial exchange and voluntary organization duly incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859.

That said association owns and occupies in the city of Chicago an exchange building where its members meet daily (except Sundays and holidays) between certain business hours for the purpose of buying and selling flour, wheat, corn, oats, rye, barley, hay, straw, flaxseed, grass seed, field seed, pork in all its forms, meats, lard, and other food products and for the transaction of such other business as is incident thereto; that among its members there are some whose business it is to purchase in the country or to receive on consignment from persons in the country

some or all of the foregoing articles and sell the same upon said board of trade, and there are other members of said association whose business it is to buy upon said exchange some or all of said articles of merchandise, either for themselves or on commission, and to deliver or ship the same to consumers or distributors throughout this country and Europe, and that the sales and contracts for sales of said merchandise so made upon said board of trade are identical in their character with all other sales and contracts for sales of the same kind of merchandise made in the city of Chicago and elsewhere throughout the United States at other places than on such exchanges, boards of trade, or other similar places.

That on the 4th day of October, 1898, in the course of his business upon said board of trade, your petitioner sold for immediate delivery at the city of Chicago to one Robert W. Roloson, also a member of said board of trade and a citizen of the State of Illinois, ten (10) tierces of hams, weighing three thousand (3,000) pounds, at a price of six and one-half ($6\frac{1}{2}$) cents per pound, and for a total sum of one hundred and ninety-five (\$195) dollars, without affixing to the written memorandum thereof delivered by your petitioner to said buyer any revenue stamp; and thereafter, on, to wit, the 10th day of October, 1898, John C. Black, Esquire, as the United States attorney for the northern district of Illinois, presented to and, with leave of said court, filed in the circuit court of the United States for the northern district of Illinois, northern division, a certain information and affidavit reciting said sale by your petitioner of said ten (10) tierces of hams; and also reciting that your petitioner on said sale unlawfully did make and deliver to said Roloson a bill and memo-

randum of said sale, showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, without affixing the proper stamp to said bill and memorandum for denoting the internal-revenue tax upon such bill and memorandum, as required by the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures and for other purposes;" and thereupon said court upon said petition ordered a bench warrant to issue against your petitioner; whereon your petitioner was brought into said court, and, said information being read to him, interposed a motion to quash the same upon the ground that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void; but said circuit court entered an order denying said motion and requiring your petitioner to plead to said information, to which your petitioner then and there duly excepted; whereupon your petitioner interposed a demurrer to said information on the ground that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void, and that for that reason said information did not charge an offense or crime against the laws of the United States; but said court overruled said demurrer; to which your petitioner then and there duly excepted; and thereupon your petitioner was arraigned upon said information, and thereupon entered his plea of not guilty; and said cause having proceeded to trial, the jury rendered a verdict finding this petitioner guilty as charged in said information; whereupon your petitioner successively entered his motions for a new trial and in arrest

of judgment, which were successively overruled; to both of which rulings your petitioner then and there duly excepted and thereupon and on the 11th day of October, A. D. 1898, said court entered its sentence and judgment of conviction, wherein it imposed upon your petitioner a fine of five hundred dollars and committed your petitioner to the county jail of Cook county, State of Illinois, until said fine and costs should be paid; a copy of which said affidavit, information, motion to quash, demurrer, motions for a new trial and in arrest of judgment, orders, sentence, and judgment of conviction, being the entire record of said case in said court, are hereto annexed and made a part hereof as "Exhibit B."

And thereupon, your petitioner having refused to pay said fine, and said order of commitment having come to the hands of said marshal, said marshal, on the 11th day of October, 1898, took your petitioner into his custody under said warrant and now has your petitioner in his custody, and is now in the act of transporting him to said jail specified in said commitment.

And your petitioner claims that he is restrained and deprived of his liberty, as above stated, unlawfully, and that that part of said act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void for the following reason (and others):

Because said act of Congress, so far as it imposes the tax upon which said information is based, is contrary to the Constitution of the United States, in that said tax is not uniform throughout the United States, because not imposed upon all bills, memoranda, agreements, or other evidences of sales or agreements to sell merchandise, but on such only as relate to such sales, or agreements to sell, when made at an ex-

change, board of trade, or other similar place, and hence that said information does not charge an offense or crime under or by virtue of the laws of the United States, and that said circuit court for the northern district of Illinois, northern division, in so trying and committing to jail your petitioner, as aforesaid, acted wholly without jurisdiction or legal authority so to do, and said order under which your petitioner is held in custody is wholly void.

Your petitioner further says that one James Nicol, of the city of Chicago, and a member of said Chicago board of trade, having been convicted by the district court of the United States for the northern district of Illinois, northern division, for the failure to comply with that part of said act of Congress approved June 13, 1898, which applies to the exchanges, boards of trade, and other similar places, thereafter, on the 13th day of September, 1898, the said James Nicol sought, through *habeas corpus* proceedings in the circuit court of the United States for the northern district of Illinois, northern division, to secure his discharge, and in said proceedings made the same contention against the constitutionality of said act of Congress approved June 13, 1898, as is herein made by your petitioner, but said circuit court, after hearing the arguments of counsel, decided against the contention of said James Nicol and in favor of the constitutionality of said act of Congress, and refused to discharge the said James Nicol, by reason whereof the said James Nicol was obliged to and has perfected his appeal from said order and judgment of said circuit court to this court. By reason whereof it would avail your petitioner nothing to attempt to secure his discharge from imprisonment through *habeas corpus* proceedings in said circuit court of the United States for the northern district of

Illinois, and your petitioner is remediless in the premises except through this application to this court.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said John Ames, United States marshal for the northern district of Illinois, may issue at once in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require, and that a writ of certiorari, if necessary, may also be issued to the clerk of the circuit court for the northern district of Illinois, northern division, commanding him to transmit at once to this court a full, complete, and true transcript of said cause and pleadings, wherein your petitioner has been convicted, as aforesaid.

GEORGE R. NICHOLS.

JOHN G. CARLISLE,

HENRY S. ROBBINS,

Counsel for Petitioner.

UNITED STATES OF AMERICA, { ss :
Northern District of Illinois,

George R. Nichols, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true.

GEORGE R. NICHOLS.

Subscribed and sworn to before me this eleventh day of October, A. D. 1898.

[SEAL.]

C. R. PICKARD,

U. S. Commissioner, Northern District of Illinois.

EXHIBIT A.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

The President of the United States of America to the marshal of the northern district of Illinois, Greeting :

Whereas George R. Nichols appeared before the circuit court of the United States for the northern district of Illinois on the 11th day of October, 1898, to answer an information filed herein against him for having sold to one Robert W. Roloson ten tierces, or three thousand pounds, of hams without affixing the proper stamps to the bill or memorandum of sale, as required by the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and the said George R. Nichols, upon hearing in due form of law, having been found guilty as charged in the said information, and having this day been sentenced to pay a fine of five hundred dollars, besides the costs in this behalf expended, and in default thereof to stand committed to the county jail of Cook county, Illinois, until said fine and costs are paid for or he is otherwise discharged by law :

Now, therefore, you are hereby commanded to commit the said George R. Nichols to the county jail of Cook county, Illinois, to be there safely kept until said fine and costs are paid, or until he is otherwise discharged by due process of law.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this eleventh

day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123d year.

S. W. BURNHAM,
*Clerk United States Circuit Court, Northern
 District of Illinois.*

NORTHERN DISTRICT OF ILLINOIS, { ss :
Northern Division,

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the commitment issued out of said court on the 11th day of October, A. D. 1898, in the cause wherein The United States is the plaintiff and George R. Nichols is the defendant, as the same appears from the original now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 11th day of October, A. D. 1898.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Clerk.*

EXHIBIT B.

Pleas in the circuit court of the United States for the northern district of Illinois, begun and holden before the Honorable John W. Showalter, judge of the United States circuit court of the seventh judicial circuit, at the United States court-room, in Chicago, in said district, on Monday,

the third day of October, being the first day of the October adjourned term, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123d.

S. W. BURNHAM, *Clerk*.

Be it remembered that on the 10th day of October, 1898, there was filed in the office of the clerk of said court the information of the United States in words and figures following, to wit :

Information.

NORTHERN DISTRICT OF ILLINOIS, }
Northern Division, } *set :*

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA
 FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN
 DIVISION, OF THE OCTOBER ADJOURNED TERM, IN THE
 YEAR EIGHTEEN HUNDRED AND NINETY-EIGHT.

THE UNITED STATES }
vs.
 GEORGE R. NICHOLS. }

Be it remembered that John C. Black, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the circuit court of the said United States for the division and district aforesaid, on this tenth day of October, in this same term, and for the said United States gives the court here to understand and be informed that George R. Nichols, of the city of Chicago, in the said division and district, and a member of a certain board of trade there, to wit, the Chicago board of trade, on

the fourth day of October, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, upon a certain board of trade, to wit, the Chicago board of trade aforesaid, with intent then and there on the part of him, the said George R. Nichols, to evade the provisions in that behalf in the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures, and for other purposes," did make to one Robert W. Roloson, of said city of Chicago, also a member of the said board of trade, a certain sale of merchandise, for immediate and present delivery at the said city of Chicago—that is to say, ten tierces, or three thousand pounds, of hams—then in the said city of Chicago, at a price of six and one-half cents per pound, and for a total sum of one hundred and ninety-five dollars, and on said sale unlawfully did make and deliver to the said Robert W. Roloson, buyer, as aforesaid, a bill and memorandum of the same sale, showing the date thereof, the name of the seller, the amount of the sale, and the matters and things to which it referred, without having the proper stamps affixed to the said bill and memorandum for denoting the internal-revenue tax upon the said sale, bill, and memorandum, as required by law, but, on the contrary, unlawfully did refuse, fail, and neglect to affix any such stamps to the said bill and memorandum, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

UNITED STATES OF AMERICA,
By JOHN C. BLACK,
United States Attorney.

(Endorsed :) Filed Oct. 10, 1898. S. W. Burnham, clerk.

Bail, \$1,000.

JOHN C. BLACK,
U. S. Att'y, N. Dist. Ills.

On the same day, to wit, the tenth day of October, 1898, there was filed in the clerk's office of said court the affidavit of Robert W. Roloson; which said affidavit is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss :

Robert W. Roloson, being duly sworn, says that he is a citizen of the State of Illinois and resides in the city of Chicago, and that on the 4th day of October, 1898, upon the Chicago board of trade, in the city of Chicago, George R. Nichols, of the city of Chicago and a member of said board of trade, made to this deponent a certain sale of merchandise for immediate and present delivery at the city of Chicago, to wit, ten (10) tierces of hams, weighing three thousand (3,000) pounds, then in the city of Chicago, at a price of six and one-half ($6\frac{1}{2}$) cents per pound, and for a total sum of one hundred and ninety-five (\$195) dollars, and at the time of said sale said Nichols delivered to this affiant a written memorandum showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it referred, but said Nichols did not affix to this memorandum any revenue stamp, as required by the act of Congress approved June 13, 1898, known as the war-revenue law.

And further deponent saith not.

ROBERT W. ROLOSON.

Subscribed and sworn to before me this 6th day of October, A. D. 1898.

[SEAL.]

WIRT E. HUMPHREY,
*United States Commissioner for
 Northern District of Illinois.*

(Endorsed :) Filed Oct. 10, 1898. S. W. Burnham, clerk.

On the same day, to wit, the tenth day of October, in the October adjourned term of said court, 1898, in the record of proceedings thereof in said-entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit :

THE UNITED STATES OF AMERICA	} Information.
vs.	
GEORGE R. NICHOLS.	

On this day comes the district attorney and files a criminal information in the cause above entitled, and reasonable and probable grounds appearing, supported by oath in writing, in the said cause, it is ordered by the court that a bench warrant issue for the apprehending of the said defendant, and further that bail be fixed at the sum endorsed upon the said information.

On the same day, to wit, the tenth day of October, 1898, a bench warrant issued out of the clerk's office of said court, directed to the marshal of said district to execute; which said bench warrant, together with the marshal's return thereon endorsed, is in the words and figures following, to wit :

Bench Warrant.

THE UNITED STATES OF AMERICA, ss :

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

To the marshal of the northern district of Illinois, Greeting :

We command you to take George R. Nichols, if he shall be found in your district, and him safely keep, so that you have his body before our judges of our circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, forthwith, to answer unto the United States of America in an information pending in said court against — —.

And have you then and there this writ, with your return thereon.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at [SEAL.] Chicago aforesaid, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123d year.

S. W. BURNHAM, *Clerk.*

(Endorsed :) The marshal will take bail in \$1,000. I have executed this writ by arresting the within-named Geo. R. Nichols and have his body now in court this 10th day of October, A. D. 1898. John C. Ames, U. S. marshal, by M. E. Patterson, deputy.

Serving warrant.....	2.00
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	<hr/>
	\$2.06

451. District court of the United States, northern district of Illinois. United States of America *vs.* Geo. R. Nichols. Bench warrant, returnable forthwith. S. W. Burnham, clerk. Filed Oct. 10, 1898. S. W. Burnham, clerk. Jno. C. Black, U. S. attorney.

On the same day, to wit, the tenth day of October, 1898, came George R. Nichols, by his attorney, and filed in the clerk's office of said court his motion to quash the information filed against him; which said motion is in words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION,
OF THE OCTOBER TERM, IN THE YEAR EIGHTEEN HUN-
DRED AND NINETY-EIGHT.

UNITED STATES	}
<i>vs.</i>	
GEORGE R. NICHOLS.	}

And now comes the defendant, George R. Nichols, by Henry S. Robbins, his attorney (the said Nichols also being present in open court), and moved the court to quash the information filed herein upon the ground that said information does not charge or set forth a crime against or under the laws of the United States, for the reason that that part of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon which said information is based, is unconstitutional and void upon the following (and other) ground:

Because said act of Congress, so far as it imposes the tax upon which said information is based, is contrary to the

Constitution of the United States, in that it is not uniform throughout the United States, because not imposed upon all bills, memoranda, agreements, or other evidences of sales or agreements to sell merchandise, but on such only as relate to such sales or agreements to sell when made at an exchange, board of trade, or other similar place, said Chicago board of trade mentioned in said information being a commercial exchange duly incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859, and owning and occupying in the city of Chicago an exchange building where its members meet between certain hours every business day for the purpose of buying and selling flour, wheat, corn, rye, oats, barley, hay, straw, flax seed, grass seed, field seeds, pork in all its forms, meats, lard, and other food products, and the sales and contracts for sales of such merchandise so made upon said board of trade being identical in their character with all other sales and contracts for sales of the same kind of merchandise made throughout the United States at other places than such exchanges, boards of trade, and other similar places.

Wherefore the defendant prays that said information may be quashed.

GEORGE R. NICHOLS,
By HENRY S. ROBBINS,
His Attorney.

(Endorsed :) Filed Oct. 10, 1898. S. W. Burnham, clerk.

On the same day, to wit, the tenth day of October, 1898, came George R. Nichols, by his attorney, and filed in the clerk's office in said entitled cause his demurrer; which said demurrer is in the words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

UNITED STATES OF AMERICA }
 vs. } 88 :
GEORGE R. NICHOLS.

And the defendant, by Henry S. Robbins, his attorney, comes and defends, etc., when, etc., and says that the information herein and the matters therein contained in the manner and form as the same are above set forth are not sufficient in law for the plaintiff to maintain his aforesaid action, and for this reason he, the defendant, is not bound by law to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment, and that he may be discharged, etc.

And the defendant shows to the court here the following cause of demurrer to the said information—that is to say, that that part of the act of Congress approved June 13, 1898, upon which said information is based is unconstitutional and void.

GEORGE R. NICHOLS,
By HENRY S. ROBBINS,
His Attorney.

(Endorsed :) Filed Oct. 10, 1898. S. W. Burnham, clerk.

On the same day, to wit, the tenth day of October, 1898, came George R. Nichols, by his attorney, and filed in the clerk's office of said court his motion in arrest of judgment; which said motion is in words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION,
OF THE OCTOBER TERM, IN THE YEAR EIGHTEEN HUN-
DRED AND NINETY-EIGHT.

UNITED STATES }
vs. }
GEORGE R. NICHOLS. }

And now comes George R. Nichols, by Henry S. Robbins, his attorney, and moves the court in arrest of judgment on the finding herein, and in support of said motion alleges that said information does not charge or set forth a crime against or under the laws of the United States for the reason that that part of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon which said information is based, is unconstitutional and void upon the following (and other) ground :

Because said act of Congress, so far as it imposes the tax upon which said information is based, is contrary to the Constitution of the United States in that said tax is not imposed upon all bills, memoranda, agreements, or other evidences of sales or agreements to sell merchandise, but on such only as relate to such sales or agreements to sell when made at an exchange, board of trade, or other similar place, said Chicago board of trade mentioned in said information being a commercial exchange duly incorporated by a special act of the legislature of the State of Illinois approved February 18, 1859, and owning and occupying in the city of Chicago an exchange building where its members meet between certain hours on every business day for the pur-

pose of buying and selling flour, wheat, corn, rye, oats, barley, hay, straw, flax seed, grass seed, field seeds, pork in all its forms, meats, lard, and other food products, and the sales and contracts for sales of such merchandise so made upon said board of trade being identical in their character with all other sales and contracts for sales of the same kind of merchandise made throughout the United States at other places than such exchanges, boards of trade, and other similar places.

Wherefore the defendant prays that judgment be not entered on the finding herein.

GEORGE R. NICHOLS,
By HENRY S. ROBBINS,
His Attorney.

(Endorsed :) Filed Oct. 10, 1898. S. W. Burnham, clerk.

On the same day, to wit, the tenth day of October, in the October adjourned term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF
ILLINOIS, NORTHERN DIVISION.

MONDAY, *October 10, 1898.*

Present: Hon. John W. Showalter, circuit judge.

THE UNITED STATES OF AMERICA	} 24961. Information.
<i>vs.</i>	
GEORGE R. NICHOLS.	

Now, on this day, comes the district attorney, and by leave of court files a criminal information against said de-

fendant, supported by the affidavit of Robert W. Roloson ; and thereupon the court orders that a bench warrant issue, returnable forthwith, for the arrest of said defendant, and that bail be fixed thereon at the sum of one thousand dollars ; and now comes the marshal and makes return to said warrant by bringing into open court the body of said defendant, George R. Nichols ; and now comes the defendant in his own proper person and by attorney, and the defendant, by leave of court, enters his motion to quash said information, and the same is heard and overruled ; to which ruling the defendant excepts, and the defendant, by leave of court, files his demurrer to said information, and the court, having heard the arguments of counsel upon said demurrer and being now fully advised in the premises, overrules said demurrer ; to which ruling the defendant excepts, and said defendant, being now arraigned at the bar of this court, for plea to said information says he is not guilty, and, this cause being now called for trial, now come the following jury, to wit, E. C. Sawyer, J. F. Conner, William Aubrey, S. T. Walker, M. S. Hancock, H. G. Griffith, C. E. Heeter, James Soenksen, Thomas Covington, H. McKenzie, Jacob Englehoff, and Frank Johnson, in all twelve good and lawful men, duly elected, tried, and sworn to well and truly try said issue and a true verdict give according to the law and evidence, and after hearing the evidence to conclusion, together with the arguments of counsel, said jury are charged by the court, and thereupon return into open court their verdict in the following words, to wit : " We, the jury, find the defendant guilty.—S. T. Walker, foreman ;" and thereupon the defendant, by his attorney, enters his motion for a new trial, which is heard and overruled, and the de-

defendant enters his further motion in arrest of judgment, and the same is postponed for future hearing.

And thereafter, to wit, on the eleventh day of October, A. D. 1898, among the proceedings of said court appears the following entry, to wit :

Before Honorable John W. Showalter, circuit judge.

THE UNITED STATES	}	Information.
<i>vs.</i>		
GEORGE R. NICHOLS.		

Comes the district attorney and the defendant in person and by his attorney, and the court, being fully advised upon the motion of the defendant in arrest of judgment, overrules the same; to which order the defendant, by his attorney, then and there duly excepted.

And afterwards, to wit, on the eleventh day of October, in the October adjourned term of said court, 1898, in the record of proceedings thereon in said entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit :

Order.

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

TUESDAY, *October 11*, 1898.

Present: Hon. John W. Showalter, circuit judge.

THE UNITED STATES OF AMERICA	}
<i>vs.</i>	
GEORGE R. NICHOLS.	

Come the parties, by their attorneys, and the defendant, George R. Nichols, in his own proper person, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 10th day of October, A. D. 1898, one of the days of this term of this court, been by a jury of this court adjudged guilty in due form of law, as charged in the information filed herein against him, and being asked by the court if he had anything to say why the sentence and judgment of this court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced against him, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein as aforesaid, that the defendant, George R. Nichols, forfeit and pay to the United States a fine in the sum of five hundred dollars, besides the costs in this behalf expended.

It is further ordered by the court that the said defendant stand committed to the county jail of Cook county, Illinois, until said fine and costs are paid or until he is otherwise discharged by law.

NORTHERN DISTRICT OF ILLINOIS, ss :

I, S. W. Burnham, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all proceedings had in the cause entitled The United States, plaintiff, and George W. Nichols, defendant, as the same appears from the records and files of the said court now in my custody and control.

[SEAL.]

S. W. BURNHAM, *Clerk.*

[Endorsed:] United States Supreme Court. George R. Nichols, petitioner for a writ of *habeas corpus*. Petition. Henry S. Robbins, Home insurance building, Chicago.

[Endorsed:] Supreme Court U. S., October term, 1898. Term No., 4. Original. *Ex parte*, in the matter of George R. Nichols, petitioner. Petition for writ of *habeas corpus*. Filed October 13, 1898.



No. 435 and 4 Original

FILED
DEC 5 1898

CLERK

By. of Robinson Carlisle
Supreme Court of the United States.

OCTOBER TERM, A. D. 1898

Filed Dec. 5, 1898.

No. 435.

JAMES NICOL,

Appellant.

vs.

JOHN AMES, United States Marshal for
the Northern District of Illinois.

Appellee.

*Appeal from Circuit
Court for the North-
ern District of Illi-
nois.*

No. 4, Original.

EX PARTE, IN THE MATTER OF GEORGE
R. NICHOLS,

Petitioner.

*Petition for writ
of Habeas Corpus.*

BRIEF AND ARGUMENT FOR APPELLANT AND
PETITIONER.

Mr. HENRY S. ROBBINS,

COUNSEL.

Mr. JOHN G. CARLISLE,

OF COUNSEL.

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 435.

JAMES NICOL,	}	Appeal from Circuit Court for the North- ern District of Illi- nois.
<i>Appellant,</i>		
vs.		
JOHN AMES, United States Marshal for the Northern District of Illinois,		
<i>Appellee.</i>		

No. 4, Original.

EX PARTE; IN THE MATTER OF GEORGE	}	Petition for Writ of Habeas Corpus.
R. NICHOLS,		
<i>Petitioner,</i>		

STATEMENT.

The only question in these cases is the constitutionality of those parts of the new Revenue Act of June 13, 1898, which (1) require every seller of products upon an exchange or board of trade to deliver to the buyer a written memorandum or other evidence thereof, and (2) impose a stamp tax on every such memorandum. That act, so far as material, is as follows:

ADHESIVE STAMPS.

" Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SCHEDULE A.

STAMP TAXES.

" Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: PROVIDED, that on every sale or agreement of sale, or agreement to sell, as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps, in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax, as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or

agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court."

THE CASE OF JAMES NICOL.

This appellant, being a citizen of the State of Illinois and a member of the Chicago Board of Trade, sold upon that exchange for immediate delivery at Chicago to one Milne, also a citizen of that state, two carloads of oats then in Chicago, *without making or delivering to said buyer any bill, memorandum, agreement or other evidence of such sale showing the date thereof, the name of the seller, the amount of the sale and the matter or thing to which it referred.*

Upon an information by the district attorney setting out these facts being filed in the *District Court* at Chicago, a bench warrant issued, and after appellant's motion to quash upon the ground that these parts of the act were unconstitutional had been overruled, as well as his demurrer and motion in arrest based upon the same ground, he was duly convicted and committed to the county jail until he paid a fine of \$500. Being taken into custody by the marshal, he applied to the *Circuit Court* at Chicago for a writ of *habeas corpus* upon the ground that the act under which he had been convicted was unconstitutional. The *Circuit Court* granted the writ, and admitted appellant to bail pending a

hearing, but upon the return to the writ decided the act constitutional (Opinion, Record, p. 20), and remanded him to custody. Thereupon he was allowed and perfected the present appeal, and was by the Circuit Court again admitted to bail pending the appeal.

The only error assigned is the Circuit Court's refusal to decide the act unconstitutional and discharge appellant.

THE CASE OF GEORGE R. NICHOLS.

This petitioner, also a citizen of Illinois, and a member of the same board of trade, sold for immediate delivery at Chicago to one Roloson, also a citizen of that state, ten tierces of hams for \$195, delivering to the buyer the written memorandum required by the above act, *but failing to affix thereto the stamp required by it.*

Upon an information by the district attorney setting up these facts, and other proceedings in the *Circuit* Court at Chicago similar to those in the District Court in the case of James Nicol, the petitioner was fined \$500 for failure to affix such stamp, and committed to jail until its payment. Being taken into custody by the marshal, petitioner applied to this court for leave to file the present petition for a writ of *habeas corpus*, seeking a discharge upon the ground that the above act, so far as it imposed the tax in question, is unconstitutional. Leave was given, a rule upon the respondent to show cause was entered, and a return has been filed, submitting the case upon the allegations of the petition.

By order of this court these two cases are to be heard as one case, and will therefore be discussed in one brief.

In support of a reversal in the first case and a writ of *habeas corpus* in the second, this brief urges the following:

POINTS.

I.

Habeas corpus is the proper remedy where the prisoner is in custody upon conviction for an offense created by an unconstitutional law.

Ex parte Siebold, 100 U. S., 371.

Ex parte Royall, 117 U. S., 248.

In re Coy, 127 U. S., 758.

In re Neilsen, 131 U. S., 182.

II.

The Circuit Court, having in both cases upheld the constitutionality of the present law, and having, in the case of James Nicol, denied a writ of *habeas corpus*, an application by George R. Nichols to that court would have been useless; hence an application by him directly to this court is in accordance with its practice.

Ex parte Terry, 128 U. S., 289-302.

Sawyer's Case, 124 U. S., 200.

Ex parte Bain, 121 U. S., 1.

In re Tyler, 149 U. S., 164.

In re Ayres, 123 U. S., 443.

III.

THE TAX IN QUESTION, IF AN INDIRECT TAX, IS A STAMP
TAX UPON DOCUMENTS.

It is not a privilege tax. A commercial exchange is a voluntary association (the Chicago Board of Trade,

although incorporated, has been decided to be such—*Board of Trade v. Nelson*, 162 Ill., 431), and neither the privilege of being a member of an exchange nor of having one's property sold there, nor of being a seller there, is a privilege in the legal sense—that is, a taxable privilege.

Mayor v. Guest, 40 Tenn. (3 Head.), 414.

Cooley on Taxation, 2nd Ed., 571.

Charleston v. Oliver, 16 S. C., 47.

Nor is this an occupation tax—such a tax being imposed elsewhere in this act upon brokers, and the law not presuming double taxation.

Cooley on Taxation, 227.

Board v. Gas Light Company, 64 Ala., 273.

Nor is it a tax on sales, which would in reality be a tax on the commodity sold.

Cook v. Pennsylvania, 97 U. S., 566.

Brown v. Maryland, 12 Wheaton, 419.

For agreements to sell for future delivery are taxed and in these there is usually no commodity to tax, such contracts, although generally settled by the payment of differences, being legal—

Bibb v. Allen, 149 U. S., 499;

Miles v. Andrews, 40 Ill. App., 155.

and, whether legal or not, would be taxable—

License Taxes Cases, 5 Wall., 463;

Almy v. California, 24 How., 169, as construed by *Woodruff v. Parham*, 8 Wall., 123, is not in conflict with the proposition that this is a stamp tax only.

IV.

CONGRESS IS WITHOUT CONSTITUTIONAL POWER TO REQUIRE WRITTEN MEMORANDA OF INTRA-STATE CONTRACTS OR TRANSACTIONS.

This act, by imposing a penalty and creating a misdemeanor, prohibits oral sales or contracts of sales, and thereby interferes with intra-state commerce—this regardless of whether it makes the sale void or not

Brown v. Maryland, 12 Wheaton, 433.

Congress cannot regulate intra-state commerce.

United States v. De Witt, 9 Wall., 44.

Lane County v. Oregon, 7 Wall., 76.

Nor can it do this as a "necessary and proper" means of levying taxes.

"Necessary and proper," under sub-clause 18, Sec. 8, of the Constitution authorizes only such laws as are (1) "appropriate and plainly adapted" to the levying of the tax, and (2) "consist with the spirit of the constitution."

McCulloch v. Maryland, 4 Wheaton, 316.

Legal Tender Cases, 12 Wall., 457.

But the only purpose of requiring written memoranda is to increase the number of such documents to be taxed, which is not a proper incident to the taxing power.

United States v. De Witt, 9 Wall., 42.

License Cases, 5 Wall., 463.

Congressional interference with state commerce, in whatever form or degree, is to be as much condemned as

has been state interference, in whatever form or degree, with inter-state or foreign commerce.

Henderson v. Mayor, 92 U. S., 271.

Webber v. Virginia, 103 U. S., 350.

Pickard v. Pullman, 117 U. S., 35.

Robbins v. Shelby Taxing District, 120 U. S., 489.

Moran v. New Orleans, 112 U. S., 69.

Leloup v. Mobile, 127 U. S., 641.

Almy v. California, 24 How., 169.

Guy v. Baltimore, 100 U. S., 434.

This interference with oral contracts within a state does not "consist with the spirit of the constitution."

Moore v. Moore, 47 N. Y., 467.

Sammons v. Holloway, 21 Mich., 163.

Craig v. Dimock, 47 Ill., 310.

Davis v. Richardson, 45 Miss., 500.

Forcheimer v. Holly, 14 Fla., 243.

Sporrer v. Eifler, 57 Tenn. (Heisk), 633.

Duffy v. Hobson, 40 Cal., 240.

Carpenter v. Snelling, 97 Mass., 452.

Such legislation, if independent of a tax law, would be class legislation, because depriving some, but not all, of the right to contract orally.

Millet v. People, 117 Ill., 298.

Harding v. People, 160 Ill., 459.

Florrer v. People, 141 Ill., 171.

State v. Goodwill, 33 W. Va., 179.

Godcharles v. Wigeman, 113 Penn. State, 431.

Kuhn v. Common Council, 70 Mich., 537.

Application of Jacobs, 98 N. Y., 98.

Butchers' Union v. Crescent City Co., 111 U. S., 746.

Barbier v. Connolly, 113 U. S., 703.

Fick Wo v. Hopkins, 118 U. S., 356.

If the right to thus discriminate respecting oral contracts be sustainable at all, it can only be when it is *necessary* to taxation, and not where, as here, it is neither necessary or usual. In the latter case it is clearly contrary to the "spirit of the constitution." It takes from a taxpayer, *as a part of his tax*, his constitutional right to contract or trade orally as others do.

A liberal construction is to be resorted to for the protection of constitutional rights.

Boyd v. United States, 116 U. S., 635.

Navigable Co. v. United States, 148 U. S., 325.

Oakley v. Aspinwall, 3 N. Y., 547.

V.

THIS TAX, IF A STAMP OR OTHER INDIRECT TAX, VIOLATES THE RULE OF UNIFORMITY.

The constitution requires not merely "geographical uniformity," but practical uniformity between taxpayers, which means, not that all persons or all property must be taxed, if any are, but that all persons similarly situated, and all property of the same kind, be proportionately taxed, if any such person or property is taxed.

This construction is required by the state of history

and political economy at the time of the adoption of the constitution, as well as by the circumstances attending the insertion of this uniformity clause in the constitution.

The power to tax implies the power to destroy.

McCulloch v. Maryland, 4 Wheaton, 431.

Weston v. Charleston, 2 Peters, 449.

Loan Association v. Topeka, 20 Wall., 655.

Uniformity has been defined as above by this court in :

United States v. Singer, 15 Wall., 111.

Head Money Cases, 112 U. S., 580.

This rule of taxation requires an essential difference between the subjects taxed and those untaxed.

Pacific Ex. Co. v. Siebert, 142 U. S., 339.

Senior v. Ratterman, 44 Ohio St., 661.

This does not arise from the mere difference of locality of a sale of the thing taxed, nor from greater convenience attending the making of such sale.

ARGUMENT.

I.

THIS TAX, IF AN INDIRECT TAX, IS A STAMP TAX ON DOCUMENTS.

This court, adopting substantially the classification given by Turgot, has said of the subjects of taxation :

“These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation.”

State Tax on Foreign-held Bonds, 15 Wall.,
300, 319.

The Federal constitution, speaking more with reference to the forms, than the subjects, of taxation, makes a division into, taxes (seemingly meaning only direct taxes), duties, imposts and excises, and separates the first from these other classes by prescribing for it the rule of apportionment, and for them the rule of uniformity.

As the question whether the present be a direct or indirect tax will be discussed in the brief of our associate counsel, it is not the purpose of this brief to consider it. The present aim is to show that—assuming it to be an indirect tax—it is a stamp tax on documents and nothing else.

All will agree that this tax, if an indirect tax, is either a duty, an impost, or an excise.

That it is not a tax upon the members of, or memberships in, an exchange will hardly be disputed. If intended as such, it would have been laid on all its members—not only upon such as are sellers, but the many such members who, as the uncontradicted averments of the petitions show, only buy on an exchange and hence escape this tax.

Nor can any form of indirect federal taxation be conceived that will reach members of voluntary associations, or the privilege of membership therein. As well attempt to tax the members of, or membership in, social clubs. An exchange is a voluntary association of merchants for convenience in trading (*Chicago Board of Trade v. Nelson*, 162 Ill., 431), just as a social club is a voluntary association of men for social advantages; and members, or membership, neither are proper subjects of federal taxation.

Nor is this tax—the Circuit Court to the contrary notwithstanding—a tax upon a privilege. That privileges—using the term in its legal sense—are taxable, is not denied. But a privilege, in the ordinary sense in which that term is used, when, for instance, we speak of the “privileges and immunities of citizens,” is not taxable as such. Thus, the privilege of congenial companionship, of purchasing at a store, or enjoying the accommodations of an hotel by paying for them, and the many other advantages or privileges which all enjoy alike, and which are not confined to a few, nor based upon a special governmental grant, are not subject to what is called a privilege tax.

It is settled that a privilege, in this sense, is not taxable as such.

Mayor v. Guest, 40 Tenn. (3 Head.), 414.

Cooley on Taxation, 2nd Ed., 571.

Charleston v. Oliver, 16 S. C., 47.

If such privilege related strictly to the person, the tax upon it would be in the nature of a capitation tax. If it appertained to property, the tax upon it would in effect be a tax upon such property. Thus a tax upon the privilege of having one's property sold upon an exchange—a privilege all may enjoy on all exchanges by paying for it—would be but a tax on the sales at such exchange, or more accurately, a tax upon the property when sold there.

A privilege, in the legal sense, is defined by the Century Dictionary as :

“ A special and exclusive right conferred by law on particular persons or classes of persons, and ordinarily in derogation of a common right,”

and by the Encyclopedia Britannica as follows :

“ A privilege in law is an immunity or exemption conferred by special grant in derogation of a common right.”

As thus defined, privileges are taxable. Of this character is the franchise or privilege of being a corporation, and privilege-taxes thereon this court has frequently recognized. Thus defined, a privilege tax cannot apply to the so-called privilege (common to all) of having one's property sold on an exchange, nor the so-called privilege—not emanating from any governmental grant—of being a member of a social club or of a voluntary commercial association formed, not for pecuniary profit, but for convenient trading.

But the learned Circuit judge, in calling this a privilege

tax, refers not to the privilege of having one's commodity sold on an exchange, or of being a member of such exchange, but to the privilege of being a seller thereon. "This privilege," he says, "is itself a property or thing of value." It is doubtless of pecuniary advantage where the right to sell on an exchange is confined to its members, and is only exercised for outsiders upon payment of a commission, for then the owner selling his own commodity thereon saves a commission, and the broker selling for another earns one. But this is not so in exchanges that are open to all sellers, such as the Chicago Live Stock Exchange, which (as Judge Grosscup has recently correctly decided) the language of this act includes.

Again, if this be a tax upon the privilege of being a seller on an exchange, then it follows that the tax is payable by the broker and not by his principal—as indeed the learned Circuit judge decided. But on this point even the Government differs from him; for the present Commissioner of Internal Revenue—acting doubtless under instructions from the law department of the Government—has, since Judge Showalter's decision, ruled that the tax is payable, not by the broker, but by the principal. We refer to the ruling of such Commissioner promulgated November 5, 1898, as follows:

"That in case of a broker who is a member of the Board of Trade negotiating a sale of grain or produce on the Exchange as a broker for a principal, the principal afterwards assuming the trade, the broker is required to deliver and pay a ten-cent tax on his note or memorandum of sale, and the principal is required to pay a tax on the sale at the rate of one cent on each \$100 of the amount or fractional part of \$100 in excess of \$100."

In this the Commissioner is undoubtedly right. The

law nowhere speaks of *sellers*, but of "each sale, agreement of sale, or agreement to sell," on an exchange, thus contemplating, as the Commissioner holds, the payment of the tax by him whose property is sold, and not by the broker, who is in no legal sense a party to such sale or agreement. Every tax law should, as this does, clearly specify the incidence of the tax so as to avoid uncertainty as to who shall pay it.

Again, how can the privilege of being a seller for oneself, or for another, be, in this legal sense, a privilege subject to taxation? It cannot be said to emanate from the state. It arises, not by reason of any act of incorporation, for exchanges need not be incorporated. It results from the concurrent desire of a number of traders in the same line of business to rendezvous at a convenient place during the business hours of a day to more conveniently trade. This is the origin of these voluntary associations. The state law confers no right or privilege upon them, and probably could not constitutionally prevent their members from thus meeting together in trade. Some of these associations own buildings and some hire rooms for trading purposes. Many, doubtless, have not, and none need, any special grant of the right to thus assemble. Even in incorporated associations, the only grant is the right to be a corporation, which could be taxed only by means of a franchise tax, which this concededly is not.

Again, this so-called privilege which the learned Circuit Judge has in mind is in reality not the privilege of selling, but the privilege of trading; that is, buying or selling on an exchange. Those, whose only business it is, as we have seen, to *buy* on exchanges, enjoy identically the same advantages or so-called privilege as those whose

business it is to *sell* thereon. In the case of an exclusive exchange, one who buys for himself saves a commission, and one who buys as broker for another earns one in the same way that a selling member does. Hence this cannot have been intended to be a tax upon the so-called privilege of being a seller, because as *such* it would violate the rule of uniformity in not also taxing those who enjoy the like privilege of being buyers on an exchange.

Again, has not the learned judge here confounded a privilege tax with an occupation tax? Is not the exercise of the so-called privilege of trading on an exchange in reality but the pursuit of an occupation, and is not a tax on it sustainable only as a tax on an occupation? But a tax on an occupation is in reality a tax upon him who exercises such occupation. It is a tax on persons and not on things; whereas, the present tax is one upon things and not persons, as is very plain from a reading of Section 6, quoted at the opening of this brief.

That it is not an occupation tax is strongly reinforced by the second section of the present law, which provides for special taxes upon persons exercising certain occupations. If the intention had been to tax the occupation of traders or sellers on an exchange, Congress would have included them in this section, and, not having done so, the conclusion is irresistible that it did not intend to tax them.

Furthermore, this second section of the act does now tax as "commercial brokers" every person "whose business it is as a broker to negotiate sales or purchases of goods, wares, produce, or merchandise." Having thus once taxed selling brokers on exchanges, it is inconceivable that the purpose was to again tax such persons by Schedule A. That Congress intended double taxation, and especially a double occupation tax, is not to be presumed.

“It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time.”

Cooley on Taxation, 227.

Board v. Gaslight Company, 64 Ala., 273.

Clearly, then, the tax in controversy is neither an occupation, nor a privilege, tax.

Nor is it an indirect tax on sales. The right of Congress to tax all sales of all commodities is not questioned, although it would be a direct tax, except as to consumable commodities, and even as to these, if all sales thereof were not taxed. Such a tax is an extremely vicious one because involving a repetition of the tax upon the same property every time it is sold. For this reason it has rarely been resorted to. Among the few historic instances is the famous Al Cavala of Spain, a tax upon every sale of every kind of property, to which Ustaritz attributed the ruin of the manufactories of Spain, and Adam Smith the declension of Spanish agriculture.

It is also conceded that a tax on the sale of the seller's existing property is in reality, as this court has held in *Cook v. Pennsylvania*, 97 U. S., 566, and *Brown v. Maryland*, 12 Wheaton, 419, a tax upon the commodity itself.

But while Congress in its discretion may, it is not obliged to, tax the commodity itself at the time of its

sale. It may tax the means of transference as distinguished from the commodity itself.

The present law imposes a tax, not only where the seller, then owning the property, sells it, but also on agreements to sell for *future* delivery. Here Congress doubtless aimed to reach the usual speculative contracts, against which the recent proposed anti-option legislation was aimed. In these contracts, the seller does not always own the commodity at the time of the sale. Frequently he never owns it, but the contract is settled between him and the buyer by the one paying the other the difference between the contract, and the then market, price. Such contracts and settlements thereof are legal, if when the contract was made, both parties contemplated delivery. *Bibb v. Allen*, 149 U. S., 499. *Miles v. Andrews*, 40 Ill. App., 155. Whether legal or not they would be taxable. *License Tax Cases*, 5 Wall., 463. Hence it is clear that Congress intended—at least in future sales—to tax the contracts, rather than the commodities sold or agreed to be sold.

But on further analysis it would seem that Congress intended to impose—as it had a discretion to do—a tax upon the documents rather than upon the contracts of sale, as distinguished from such documents. The law provides no way of paying the tax other than by the purchase and use of adhesive stamps. The collectors of internal revenue can only sell stamps; they cannot otherwise receive payment of this tax. If the appellant Nicol had desired to pay a tax upon his oral sale, he could not, under this law, have done so. If sellers cannot, under this law, be constitutionally required to give memoranda of their sales, then contracts of

sale, when oral, are not taxed. Thus Congress has only intended to levy a stamp tax. While the many strictly excise duties collected by the sale of stamps are not to be regarded as taxes on the box, barrel or bottle to which the stamp is affixed, still a stamp duty, in its true sense—that is, when applied to writings, is not only in form, but in its nature, a tax on documents and nothing else.

Here we do not overlook the statement in the opinion of this court in *Almy v. California*, 24 Howard, 169, that a stamp tax on a bill of lading is a tax on the property it represents. In that case the legality of a state stamp tax upon a bill of lading issued upon a shipment from one state to another was questioned. As pointed out in *Woodruff v. Parham*, 8 Wall., 123, the validity of the imposition *as a tax* was not involved, the only question in the case being whether it was a regulation by a state of commerce between the states; and in *Woodruff v. Parham* it is said that *Almy v. California* was “well decided on the ground that such a tax was a regulation of commerce.” Thus, the language of *Almy v. California* must be confined to the question decided. That decision was clearly right, because any form of restriction on commerce is an interference therewith, and a restriction in the form of a tax on the instrumentalities of commerce is a restriction on the commerce itself. But the nature of a stamp tax, *as a tax*, is a different thing from its nature as a *regulation of commerce*. In the former case the question is, what particular kind of tax has the state—having the right to select the form of its taxation—seen fit to resort to, and what are the proper incidents or limitations of that particular tax. Neither of these questions was this court required to decide, nor did it de-

cide, in the *Almy* case. Hence, what is the nature of a stamp tax is still an open question here.

But Congress in this law has itself construed it to be a tax upon the document, and not the property or contract behind the document. For if the latter, the tax could only be imposed where such property or contract was itself subject to the tax. But this law taxes deeds of real estate. Now, if Congress intended this tax to be a tax on the real estate itself or—what is the same thing—the sale thereof, instead of a tax upon the document of transference, then this tax upon deeds would be unconstitutional because, being a direct tax on real estate, it is not laid according to the rule of apportionment. This law also taxes sales and agreements to sell shares of corporate stock. If not a document tax, this is a direct tax, and invalid under the decision of the *Income Tax* cases.

That stamp duties are taxes on documents *per se* is plain when their nature and history is examined. In the economy of taxation "stamp duties are a special class of tax entirely *sui generis*."

Dowell, History Stamp Duties, 5.

The Encyclopædia Britannica says: "A stamp duty is a tax imposed upon a great variety of legal and other documents."

The Century Dictionary defines it as: "A tax or duty imposed on the sheets of parchment or paper on which specific kinds of legal documents are written."

Webster defines it as: "A duty or tax imposed on paper or parchment."

Dowell (pp. 7, 8) also defines it as a tax on documents, and on this ground distinguishes it from duties imposed by means of stamps upon proprietary articles (such as

are contained in Schedule B of the present law), which, being upon the articles themselves, “are not stamp duties, but excise duties.”

That this is a document tax becomes more apparent when its origin and history are considered. The stamp tax is said to have been invented by the Dutch in 1624 as the result of a prize being offered to any one who should discover a new kind of tax. It was first imposed in England in 1694, where it has ever since prevailed. In the advance of civilization and the development of commerce a large variety of written documents had come into use. Some were required by law, but the larger part of them rested upon necessity or convenience in the complex affairs of modern life. Thus, it has happened that, while the “vellum, parchment or paper” by itself has been of too insignificant value to sustain or justify a tax, still, with the inscription added, it has become of such utility—that is, value—to its possessor that he will stand a tax upon it rather than dispense with it. In other words, the document itself when inscribed upon has become in its nature a thing of value, and it is this “property” which is taxed by a stamp duty. Thus the tax took the character of a tax upon the document and not upon the property or contract which the document represents.

This will appear from an investigation of the different documents which have been, at different times, subject to stamp duties. A stamp tax is in its nature the same with respect to all kinds of documents to which it is applied. If as to any of them it is a tax upon a document, it is clearly so as to all of them. If in any case there is nothing but the document itself to tax, then it follows that not only in that case, but in its nature, it is a document tax, and nothing more.

Let us then consider some of the documents to which the stamp tax has been applied. In England, stamp taxes have been imposed upon pardons, reprieves, presentations, degrees in universities, dispensations, ecclesiastical licenses, writs of error, *certiorari*, *habeas corpus* and appeal, licenses and marriage certificates, depositions, bills, answers, affidavits and copies thereof, writs, decrees, judgments, citations, pleadings and copies thereof, copies of wills, protests and other notarial acts, entries of burials, marriages, births and christenings. (Dowell 23, 332.) Originally the tax was collected by requiring persons to buy from the government paper impressed with the stamp. The adhesive stamp was of more modern invention. The present law imposes a stamp tax on many documents, including all certificates required by law, telegraph messages, protests, etc. But that the present stamp tax is a document tax is admitted by the requirement in the present law of written memoranda.

Nor is this any the less a document tax because of the inverted order of expression in the second clause of Schedule A above quoted. That clause is in effect as if it read: Upon each bill, memorandum, etc., made and delivered by the seller to the buyer upon each sale, etc., at an exchange, etc., for each \$100 in value, one cent, etc., and provided that on every sale, etc., as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, etc., showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. And any person failing to make such memorandum, or to stamp the same as aforesaid when made, shall be guilty of a misdemeanor, etc.

In further support of this it is to be noted that the clause imposing the tax (section 6 above quoted) is the customary or "stock" clause used by Congress for imposing a document stamp tax. It is the clause used in the act of July 1, 1862 (section 94), to impose such a tax. It was thence copied into section 151 of the law of 1864, imposing a like tax; thence substantially copied into the present law when imposing the same character of tax.

Hence the present tax—if an indirect one—is a stamp tax on documents.

II.

CONGRESS IS WITHOUT CONSTITUTIONAL POWER TO REQUIRE WRITTEN MEMORANDA IN INTRA-STATE CONTRACTS OR TRANSACTIONS.

This question arises only in the James Nicol case.

This act requires that on every sale or agreement to sell the seller shall deliver to the buyer a written memorandum thereof. It further prescribes what such memorandum shall contain, *i. e.*, "the name of the seller, the amount of the sale, and the matter or thing to which it refers." If it omit any of these requirements the law is violated as clearly as if no memorandum at all had been delivered. In short, this act undertakes to prescribe in detail the contractual formalities of every sale or agreement to sell any product or merchandise upon an exchange.

It is not confined to sales and contracts of inter-state commerce, but applies as well to those of intra-state commerce. Of the latter class is the sale upon which Mr.

Nicol was convicted. It was a sale by a citizen, to a citizen, of Illinois, of merchandise located, and to be delivered, in Chicago—a contract made and to be performed within that state. This law, if a regulation of, or interference with, commerce, applies to the internal commerce of a state.

A failure to deliver the required memorandum is declared by the act to be a misdemeanor punishable by a fine of not less than \$500, or imprisonment not exceeding six months, or both, at the discretion of the court. Thus, this act, while not using the word "prohibit," does, as clearly as do most criminal statutes, prohibit the seller from making a sale without such memorandum, that is, from making a purely oral sale or contract to sell.

What may be the effect of this law upon the contract itself is not important. It is true, as stated by the learned Circuit judge, that "the act does not expressly declare that the oral contract in such case shall be deemed unlawful or void." It may possibly be true, as also stated by him, that this does not "follow, as a legal consequence, from what is declared," although it is difficult to see how the courts, without violating the rules of public policy, could recognize or enforce a contract, the making of which is by law made a crime.

But whether the contract itself be by this act left valid, or is made void, the question still remains whether, by what it concededly prescribes, it does not unconstitutionally interfere with the exclusive right of the states to severally regulate their internal commerce. That was the question which was submitted below and is urged here. To this question it is no answer that the act does not make the contract or sale void. If it does not, it does

declare the making of an oral contract a misdemeanor and imposes as a penalty a fine or imprisonment, or both. A citizen of Illinois, if the law be valid, can no longer make a contract or sale by word of mouth only unless willing and financially able to pay \$500 for the privilege of doing so, and not averse to becoming a criminal. Under these circumstances can it be claimed that this law does not interfere with intra-state commerce?

Suppose that a state statute without either expressly—or perhaps impliedly—declaring such sales void, should make it a misdemeanor punishable by fine or imprisonment for sellers of imported goods to sell the same in original packages without taking out a state license therefor, such statute would not, if we understand the learned Circuit judge, interfere with the right of Congress to regulate foreign commerce, because it does not render the sale itself void. But this court has expressly held the contrary.

Brown v. Maryland, 12 Wheat., 423.

Under this case and on principle any restriction, by way of penalty or otherwise, imposed by a state upon one's right to sell an imported article in the original package, would be an encroachment upon the exclusive right of Congress to regulate foreign commerce. Conversely, any Federal restriction upon a citizen's right to sell a domestic commodity to another citizen of the same state, whether it avoids the contract or merely makes the act criminal or subject to a penalty, must be an interference by Congress with a state's right to regulate its own commerce. It follows, then, that the present act is an interference with, or regulation of, intra-state commerce, and the question then is whether the right to so interfere is authorized by the Federal constitution.

At this late day the respective powers of state and Federal governments are too well established to require the citation of authorities. In our dual government each—state and Federal—is supreme in its sphere. Each may devise its own means for the discharge of its duties and the exercise of its powers. Neither can directly or indirectly, by taxation or otherwise, impede the other in the use of such means. The Federal government is strictly one of delegated powers. All powers not delegated to it nor surrendered by the constitution remain in the states. On this last point so intense a feeling was developed among the people during the efforts to secure the adoption of the constitution, that the first Congress found it necessary to incorporate in the amendments which this court has called a “bill of rights” the following:

“The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The constitution nowhere confers on Congress the power to interfere with, or regulate, the internal commerce of a state. The third clause of section 8 thereof confers power to

“regulate Commerce with foreign Nations and among the several States, and with the Indian tribes.”

Of this provision this court has said:

“This express grant of power to regulate commerce among the states has always been understood as limited by its terms, and as a virtual denial of any power to interfere with the internal trade and business of the several states except as a necessary and proper means of carrying into execution some other power expressly granted or vested.”

United States v. Dewitt, 9 Wall., 44.

See, also,

Lane County v. Oregon, 7 Wall., 76.

It will not be claimed that this requirement of written memoranda of sales, if standing by itself, and independent of any tax law, would be within the power of Congress to enact. Its constitutionality will be claimed under the following clauses of the constitution :

" Section 8. The Congress shall have power :

" 1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States ; but all duties, imposts and excises shall be uniform throughout the United States.

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus, the question is whether this invasion of a state's right to regulate its internal trade is "necessary and proper" for the exercise by Congress of the power to lay and collect taxes. If not, the provision in question is unconstitutional and Nicol illegally detained in custody.

What, then, is the meaning of the words "*necessary and proper*"?

Mr. Justice Story said that they were intended to have a sense "at once admonitory and directory," and to require that the means used in the execution of an express power should be "bona fide" appropriate to the end.

2 Story on Constitution, Sec. 1253.

When the bill incorporating a national bank came to President Washington, Hamilton, differing from Jefferson, gave him a written opinion on February 23, 1791, favoring a liberal construction, and saying, (Hamilton's Work Vol. IV., p. 109, *et seq*):

"All the means requisite and fairly applicable to the

attainment of the end of such power which are not precluded by restrictions and exceptions specified in the constitution and not contrary to the essential ends of political society. * * *

If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of national authority. * * *

There is also, this further criterion which may materially assist the decision. *Does the proposed measure abridge a pre-existing right of any state or of any individual?* If it does not, there is a strong presumption in favor of its constitutionality; and slighter relations to any declared object may be permitted to turn the scale."

From this it is plain that Hamilton thought that, where a measure did interfere with a pre-existing right of a state or an individual, a presumption against its constitutionality would arise, and its necessity as an incident to a granted power ought to be clear. Subsequently, in

McColloch v. State of Maryland, 4 Wheaton, 316, 420, 421,

Chief Justice MARSHALL defined these words as follows :

" Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and *spirit* of the constitution, are constitutional. * * *

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In the *Legal Tender* cases, 12 Wallace, 543, this court, in restating this definition, added :

"It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end ; some adaptedness or appropriateness of the laws to carry into execution the powers created by the constitution."

Hence, this prohibition of oral contracts, to be constitutional must :

- 1st. Be appropriate and plainly adapted to the levying and collection of taxes, and
- 2d. Consist with the letter and *spirit* of the constitution.

First. Is it then an "appropriate and plainly adapted" means for levying and collecting a stamp tax?

This question is, is it a proper incident to the levying, not of any kind of a tax, but of this particular form of tax? The inquiry is, not what Congress could, but what it has, taxed—not what form of taxation it constitutionally might have, but what form it actually has, exercised. Congress doubtless could, in its discretion, have taxed consumable commodities at the time of their sale, but it was not obliged to do so. Having decided not to, but instead to levy a stamp tax on documents, the question is, not what would have been incidental to such unused form of taxation, but what is properly incidental to the levying of such a tax. This is clear when we reflect that there are frequently obstacles and inconveniences inherent in the levying of certain taxes (for instance, taxes on the sale of consumable articles) which operate as a protection to the people against the exercise of that form of taxation. Doubtless

the people were not unmindful of this when they conferred upon Congress in such general terms the power to tax; and when they conferred upon it the power to levy a stamp tax they must be held to have conferred therewith only such incidental power as is appropriate to that form of taxation.

While the immediate question here is the right of Congress, in levying a stamp tax on memoranda of sales, etc., to prohibit such sales or agreements to sell on an exchange as are not accompanied by such memoranda, the real question of power here raised is much broader.

The law in question imposes also a stamp tax upon loans when evidenced by promissory notes, etc. If the question of power now now under consideration be resolved in favor of the Government, then Congress could have required all loans to be evidenced by notes or other writings in order to subject them to its stamp tax. This law taxes all brokers' notes or memoranda of sale. It could have prohibited a broker from making a sale without such note or memorandum. It taxes instruments of pledge of personal property. It could have prohibited oral pledges. It taxes every lease or agreement for the use or rent of land. It could have required every such agreement to be in writing, although most of the states permit their citizens to make short-time leases by parol. It imposes a stamp tax upon all written powers of attorney. It could have provided that no principal should confer authority upon an agent by parol. It imposes a tax upon warehouse receipts. It could have prohibited any person from becoming a bailee for storage without giving a written receipt. If Congress desired to tax—as it might—all payments of money, and preferred to do so through a stamp tax, it might, if the Solicitor

General is right, require every payer to pay by check, or give a written receipt, in order that its stamp tax might attach to such receipt or check. If it wished to tax all contracts, and preferred to do so by a stamp tax, it could require the citizens of a state—although now in most instances permitted to contract orally—to accompany *all* their contracts with written evidence thereof.

If the present law is constitutional, then Congress could do all these things, although the transactions above referred to were wholly between citizens of a state and parts of the internal commerce thereof.

So, again, while this act only requires writings concerning transactions *upon an exchange*, the real question of power here involved is much broader.

The power of Congress to tax all sales of consumable commodities—a sale on a farm, as well as a sale on an exchange—cannot be questioned. If, when selecting only the sales on an exchange for taxation, it may, as an incident to its taxing power, prohibit purely oral contracts; it may, when desiring to tax *all* sales of such commodities, prohibit under this incidental power *every oral sale or contract within a state*. This incidental power must be as extensive as the taxing power itself. It must exist as to *all* transactions between *all* citizens of a state, if it extends to any transaction of any citizen.

In other words, the position of the Government in this case must be that, in the entire domain of a state's purely internal commerce, Congress may, as an incident to its taxing power, require writings in all contracts and transactions.

That the prohibition of oral contracts is not properly incidental to the levy of a tax will be apparent, if it is con-

sidered what the taxing power really is. A tax is defined to be :

“ A contribution imposed by the government on individuals for the service of the state.”

Bouvier's Law Dictionary.

This contribution, in our day, takes the form of a sum of money. From a willing taxpayer this is all the state is entitled to, except, of course, such disclosure as will enable it to assure itself of the correctness of the amount. But the power to levy this contribution does not include the right to exact the surrender of something additional to the amount of the tax. Yet this is what the present law does. It also takes from the taxpayer the constitutional right—to which we shall refer more fully later—to contract and sell orally as fully as his fellow citizens can.

Again, the power to “ levy and collect ” this contribution does not include the power to rearrange, create or increase the subjects of taxation. Congress has no power to do this. Its power is simply to levy and collect taxes on existing subjects and resort to all “ appropriate and plainly adapted ” means for this purpose. In the present case Congress has merely laid a stamp tax on documents. In what way does the prohibition of oral contracts facilitate the levy or collection of such a tax? Its only conceivable bearing is that it increases the number of documents to be taxed.

If Congress can forbid oral contracts in order to increase the number of written ones to be stamped, then it may equally forbid the manufacture of one untaxed article in order to increase the supply of, and its revenue from, another that is taxed. It might under the present law, as already indicated, have required all loans,

leases, powers of attorney, bailments, etc., to be evidenced by writing in order to increase the number of documents taxable under this law. In short, Congress could control or forbid every act of internal commerce, and override every provision of state law concerning it, whenever to do so would increase its revenue from taxation.

If it can under the present law prohibit certain oral sales and contracts, it can also prohibit certain trades sanctioned by the state law in order to increase the volume of others that it desires to tax. If, in its exercise of the taxing powers, it can do this, why may it not for the same purpose authorize a business the state prohibits?

But the right of Congress, under its taxing power, to prohibit or authorize a trade in a state in order to increase its subjects of taxation has been distinctly denied by this court in two cases. One is

United States v. Devitt, 9 Wall., 42.

There Congress had the power to tax all—including certain mixed—oils, as in the present case Congress had the power to tax all—including oral—sales of merchandise. There Congress preferred to tax only certain oils, as here it preferred to tax only written memoranda of sales. There Congress, to increase the quantities of oils of the kind it taxed, forbade the use of certain mixed oils it did not tax. Here, in order to increase the number of written memoranda it taxes, it forbids sales without them. There, this court denied the power of Congress, as incident to its taxing power, to prohibit certain transactions pertaining to intra-state commerce. Thus that and the present case seem to be identical, and that decision would seem to control here. This court, in deciding that case, said :

"The questions certified resolve themselves into this: Has Congress the power under the constitution to prohibit trade within the limits of a state? * * * It has been urged in argument that the provision under which this indictment was framed is within this exception [incidental power]; that the prohibition of the sale of illuminating oils described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subjects of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils, the sale of which is prohibited. If the prohibition therefore has any relation to taxation at all it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

In the License Cases, 5 Wall., 463, the validity of certain Federal taxes on lotteries and the sale of liquors within states prohibiting them, was involved, and it was urged that by levying such taxes Congress in effect authorized liquors and lotteries, thus raising the question whether under its taxing power it could authorize lotteries and liquor sales which a state prohibited. This court, after referring to its power with respect to inter-state and foreign commerce, said:

"But very different considerations apply to the internal commerce or domestic trade of the states. Over this commerce and trade Congress had no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress

with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the constitution with only one exception, and only two qualifications. Congress cannot tax exports and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. *But it reaches only existing subjects.* Congress cannot authorize a trade or business within a state in order to tax it."

While the facts of this case are the reverse of *United States v. Dewitt* and the case at bar, the principle is the same. The License Cases hold that Congress, under its taxing power, cannot, in intra-state commerce, authorize what a state forbids. In the case at bar Congress has attempted to forbid what the state permits. In both cases the purpose is the same—to increase the taxable subjects. If authorizing certain intra-state trade be not an incident to the taxing power, the right to prohibit such internal trade as finds expression in oral contracts is not such incident. These two decisions of this court seem conclusive against the right under the present law to require written memoranda of sales.

But if this were, not a stamp tax on documents, but a tax on sales or commodities when sold, the result is the same. In such a tax how is the requiring of written memoranda a plainly adapted means to its levy and collection? Returns at stated periods by the seller to the collector would be. These were required by the law of 1866 respecting brokers' sales, and are required by the present law with respect

to insurance policies, etc. But the written memorandum required here is not for the inspection of the tax collector. The law imposes upon the buyer to whom it is delivered no duty respecting it. He may destroy it as soon as delivered. It in no way brings to the mind of the revenue officer the amount of the tax. The learned Circuit judge, however, suggests that its object is "to identify" the transaction. For whose benefit? The seller, who has to pay the tax, does not need to have it identified. Do not such suggestions overlook the rule laid down by this court in *Postal Telegraph Cable Co. v. Adams*, 155 U. S., 698, "that the substance and not the shadow determines the validity of the exercise of the taxing power"?

Would not the rule in *United States v. Dewitt* be equally violated, if this were a tax upon sales or commodities sold? For then would be presented a case where Congress, through a preference for a stamp tax, desired to tax such sales only as are accompanied with written memoranda, and solely to increase the number of such it prohibits all sales without them.

Here, as in the case of a stamp tax, the law improperly exacts from the citizen something additional to the amount of the tax—a constitutional and property right.

Second. Again, whether this be treated as a document tax or one upon a sale, the requirement of written memoranda must not only be "an appropriate and plainly adapted" means to the levying of such a tax, but "consist with the spirit of the constitution."

Does it meet this requirement? The spirit of the constitution is that the exclusive control of its internal commerce remains with each state—that it has the exclusive right to pass its own statutes of fraud, prescribe the

rules and formalities of the contracts and transactions of its citizens, declare the rules of devolution and transference of their property within its borders, and sanction such voluntary associations as will facilitate or increase its local trade. These are some of the reserved powers of each state, of which the people were so jealous when they adopted the "bill of rights."

This court has properly been prompt to resist every form of state interference with inter-state or foreign commerce—whether in itself hurtful to that commerce or not—whether attempted under the forms of taxation or otherwise—and "no matter how closely allied to powers conceded to be in the states," as is shown by the following cases:

Henderson v. Mayor, 92 U. S., 271.

Webber v. Virginia, 103 U. S., 350.

Pickard v. Pullman, 117 U. S., 35.

Robbins v. Shelby Taxing District, 120 U. S., 489.

Moran v. New Orleans, 112 U. S., 69.

LeLoup v. Mobile, 127 U. S., 641.

Almy v. California, 24 How., 169.

Guy v. Baltimore, 100 U. S., 434.

It will not be less ready to condemn any form of Congressional interference with a state's right to regulate its internal commerce, "no matter how closely allied to powers conceded to be" in Congress.

If the present encroachment upon the commercial power of the states were only indirect or technical, a due regard for the respective rights of state and nation would require its condemnation.

But this form of encroachment upon a state's power over

its internal commerce is not unimportant. It is much more substantial than many acts of states which this court has condemned as interfering with Congress' exclusive power over inter-state commerce. The right to prescribe the conditions under which its citizens may contract and trade is peculiarly a question for each state to decide for itself. It depends upon the intellectual capacities of its citizens. This varies in different states, and with it the question how far there should be interference with, or regulation of, contracts and trade. In prescribing such regulations an important question is, how far the citizens of a state can read and write, and how far a capacity to do so should be necessary in contracting or trading. What would be proper in one state might not, from a lower degree of intelligence, be best in another.' This assumes more importance when the extent of illiteracy in some states is considered. Thus, according to the last national census, the proportion of all persons over twenty years of age—i. e., practically of the contracting age—who could neither read nor write was; in

North Carolina.....	52.74%
South Carolina.....	48.53%
Louisiana.....	47.54%

Compendium of XI Census (1890), Miscellaneous Statistics part III, p. 316.

In other states there is much less, though still much, illiteracy. Under these conditions to hold that Congress, in levying a tax, can prohibit the citizens of states from trading or contracting with each other unless they make written contracts or memoranda thereof—thus requiring them either to know how to write, or to employ someone to do so for them—is divesting the states of, and investing Congress with, a large and important power to regulate the internal affairs and commerce of the several states.

Is then such an invasion of a state's reserved powers consistent with the spirit of the Federal constitution? The negative of this is supported by the following cases :

Moore v. Moore, 47 N. Y., 467, where, the question being whether the title to real estate passed by an unstamped deed, notwithstanding the prohibition contained in a Federal internal revenue act, the court said :

“ We now hold that it is not in the constitutional power of Congress to prescribe for the States the rules for the transfer of property within them. Without denying that it is within the power of taxation, conferred upon it, for Congress to lay an excise tax upon the business operations of communities, and to collect that tax by the means of stamps, to be placed upon the written instruments exchanged between contracting parties, and to enforce the observance of the law, to that end, by the imposition in it of penalties for its non-observance, we are of the opinion that it is without that power to declare that a contract or conveyance between citizens of a State, affecting the title to real estate, is void, for the reason that such observance has been omitted.”

Sammons v. Holloway, 21 Mich., 163:

Here it was objected that a note was void for the want of a stamp, by reason of the federal revenue law of 1866, and the court, by Mr. Justice COOLEY, said :

“ We have no doubt of the right of Congress to lay stamp duties, and to impose penalties, which may be collected by proper judicial proceedings, for any violation of their regulations on that subject. But to make void a contract made in one of the states between citizens thereof, and which is permitted by the local law, is not a proper penalty, and is not admissible under our political system. There is no hint of such a power in our Federal constitution, and it is inconsistent with the unquestioned right of the states to regulate in their own way the matters of local trade and commerce. What Congress might do regarding contracts which fall within the domain of foreign or inter-state commerce we do not undertake to say ; but the formalities of contracts like the one in

question are matters exclusively of State regulation, and if the Federal government imposes taxes upon these instruments, it *must compel their payment in some other mode than by imposing it as a condition precedent to the exercise of a right which the State, under the distribution of power by the Federal constitution, permits to its citizens.*"

In *Craig v. Dimock*, 47 Ill., 310, when passing upon the objection that the note sued on was not stamped as required by the Federal revenue law, the court said :

"While, then, the power to levy taxes for the purposes indicated in the constitution may be admitted, *it cannot be admitted it can be so exercised as to take from the domain of State legislation all such subjects as are properly confided to it, and the care of which has not been surrendered to the Congress by the states.* * * *

We will not deny the power of Congress to require such instruments to be stamped, nor the consequent power to punish by fine, an intentional evasion of the law. By conceding this, we yield all that is necessary to enable the government to carry into full effect the taxing power, and at the same time sustain and uphold in its utmost limit the exclusive power of the State to say what shall be evidence in her own courts of justice in a domestic transaction wholly unconnected in every respect with the general government."

In *Davis v. Richardson*, 45 Miss., 500, a similar case, the court said :

"While the power of taxing the property, occupations and business transactions, including contracts, purely local and domestic, is asserted and sustained, yet, it does not draw with it, as an incident, the right to exceed the taxing power. Congress may punish, as it proposes to do in the acts of 1864 and 1866, for an evasion and failure to pay the tax. It may provide stringent means of collection, by sale and distress. It may constitute the necessary corps of officials to execute the law, and arm them and the Federal judiciary with full authority in the premises. Under the power to 'levy and collect taxes,' all these means may be employed as incidental; but, under the taxing power, Congress cannot intervene in the states, and

impose new conditions upon the alienations and conveyances of real estate. * * *

Congress, too, may tax promissory notes or conveyances of lands, and may, by distress and sale, and penal sanctions, guard and insure the revenue. But it cannot make a deed or a promissory note that which it is not so by a local law. *Nor can it superadd formalities and terms not demanded by the local law. To hold to the affirmative would be to conduct to the result that Congress may repeal or amend state laws, pertaining to subjects purely local and domestic."*

Other somewhat similar cases are:

Forcheimer v. Holly, 14 Fla., 243.

Sporrer v. Eifler, 57 Tenn. (Heisk), 633.

Duffy v. Hobson, 40 Cal., 240.

Carpenter v. Snelling, 97 Mass., 452.

In the case at bar the encroachment on state power is as clear as—and still more remotely connected with the taxing power than—in the foregoing cases.

In ascertaining whether the legislation in question violates the "spirit of the constitution" another consideration, already suggested, presents itself. Congress is not obliged to tax all—but may select certain classes of—persons and property. It may select certain occupations and leave others untaxed. If it may require written memoranda of transactions in these taxed occupations, then the persons engaged in such taxed occupations cannot, while persons engaged in other untaxed occupations may still, contract by word of mouth only. If the present law be uniform and valid, then Congress by it compels those selling on an exchange to use written memoranda, while those making sales elsewhere are not

required to do so. The result is that the liberty to contract is restricted in the one case and unrestricted in all others.

That a statute of Illinois whose direct purpose was to do this would violate the state constitution is no longer open to controversy. Its constitution, like most others, provides that "no person shall be deprived of life, liberty or property without due process of law." The privilege of contracting being there, as elsewhere, a part of one's liberty as well as a property right (at least when connected with the sale of property), he can not be deprived of it by a partial law affecting some, but not all, of its citizens.

Millett v. People, 117 Ill. 298.

Harding v. People, 160 Ill., 459.

Frorer v. People, 141 Ill., 171.

The court in the latter case saying:

"It is not competent, under the constitution, for the General Assembly to single out owners and operators of a coal mine * * * and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make."

This class legislation is also condemned as violative of their constitutions by other state courts.

State v. Goodwill, 33 W. Va., 179.

Godcharles v. Wigemen, 113 Pa. St., 431.

Application of Jacobs, 98 N. Y., 98.

Kuhn v. Common Council, 70 Mich., 537.

State legislation of this "class" character is also prohibited by the 14th amendment to the Federal constitution.

Butchers' Union v. Crescent City Co., 111 U. S., 746.

Barbier v. Connolly, 113 U. S., 31.

Yick Wo v. Hopkins, 118 U. S., 356.

The fifth amendment of the Federal Constitution also provides that "no persons shall be deprived of life, liberty, or property without due process of law." This clause, construed as the states construe their similar provisions, would inhibit Congress from passing, as independent legislation, such class legislation in the regulation of inter-state commerce.

Whatever be the rule where *specific* grants of the Federal constitution conflict, the incidental powers granted by it ought to be so construed as not to conflict, at least unnecessarily, with the spirit of its other clauses.

Again, the constitutions in force prior to 1787 in Delaware (Poore Const.), 279; Kentucky, *id.*, 655; Maryland, *id.*, 818; Massachusetts, *id.*, 958; New Hampshire, *id.*, 1282; New York, *id.*, 1335; South Carolina, *id.*, 1633; Virginia, *id.*, 1909, contained the provision, "law of the land," which is synonymous with "due process of law." (Cooley's Const. Lim., 353.)

Hence, these states, at the time they conferred on Congress the general power to tax were incapable of depriving by direct legislation certain classes only of their citizens of the right to sell or contract by word of mouth.

It being clear that a statute, whose sole province is to prohibit some, but not all, sales by word of mouth, would, as class legislation, violate the spirit both of the state and Federal constitutions, would such a provision be valid

as incidental to the power to levy a tax? Whatever the answer if it were *essential* to the taxing power, it surely ought not to be upheld when it is neither essential, nor one of the usual means by which taxes are or have been levied.

The vice of the present provision, as already indicated, is that it takes from a citizen, not only a sum of money by way of a tax, but with it a property right guaranteed by the constitution—the right to sell his property under no more onerous conditions than are imposed upon all his fellow citizens.

Is this—to use the language of Chief Justice Chase in the License Cases, *supra*, “strictly incidental to the exercise of the” taxing power? Does it “consist with the spirit of the [Federal] constitution.”

Is it not just such a case as Hamilton meant (see quotation, *supra*), when he said an inquiry should be, “does the proposed measure abridge a pre-existing right of any state or of any individual?”

It is difficult to conceive that the original states, in conferring upon Congress the power to tax, intended to sanction discriminating class legislation concerning the transactions or contracts of internal trade, when this violates the spirit of their then existing, as well as their present, constitutions.

But it may be said that the present departure of Congress from its constitutional power is not hurtful or serious; that all persons on exchanges can read and write, and that requiring memoranda from them is not onerous; and that this memorandum “calls for no details of the contract,” and “need not show the name of the buyer, or the times of payment, nor need it contain covenants

of any kind." (See opinion, Rec., 23.) But of such suggestions, this court, in

Boyd v. United States, 116 U. S., 635, and
Navigation Co. v. United States, 148 U.
 S., 325,

in speaking of acts of Congress, said :

"In may be that it is the obnoxious thing in its mildest and least repulsive form ; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

Judge BRONSON, in *Oakley v. Aspinwall*, 3 N. Y., 547, 568, said :

"There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. * * *

One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow ; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

If Congress can, under its taxing power, deprive one of his right to contract by word of mouth only, the extent of the writing it may require is within legislative discretion. So, too, if this power exists as to sales on exchanges, it exists as to all contracts and transactions. For, as said by MARSHALL, C. J., in *Brown v. State of Maryland*, 12 Wheat., 419 :

“Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.”

It is insisted, therefore, that this requirement of a written memorandum is unconstitutional.

III.

THE TAX IN QUESTION, IF A STAMP OR OTHER INDIRECT TAX, VIOLATES THE RULE OF UNIFORMITY.

This question arises in both of these cases. In the George R. Nichols case, the validity of the tax is the single question. In *Nicol v. Ames*, the requirement of a written memorandum can only be sustained, if at all, as an incident to the taxing power. If the principal thing—the tax—falls, because unconstitutional, the incident—the requirement of a memorandum—falls with it.

The Federal Constitution provides, section 8, that Congress shall have power,

First. “To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but *all duties, imposts and excises shall be uniform throughout the United States.*”

The present law violates this provision in that it imposes a stamp tax upon memoranda of sales made at “an exchange, board of trade, or other similar place,” and leaves untaxed like memoranda of similar sales made elsewhere.

This involves primarily the meaning of the words “uniform throughout the United States.” This, though elaborately argued, was not defined in the Income Tax Cases. The opinions in those cases (with the exception of Mr. Justice Field’s) do not discuss it, and the dissenting

opinion of Mr. Justice White says that the court was "divided upon that subject."

Two meanings are suggested for this phrase :

First. An uniformity that is simply *geographical*, and is satisfied, if the tax is the same in each state as it is in every other. It is met, however unequal and unjust the tax may be as between individual taxpayers, if this inequality be the same throughout the United States. Discrimination or inequality of taxation as between individuals or subjects taxed is here "uniformity," if it exists equally in all the states and is not created with reference to state lines.

Second. An uniformity between taxpayers—which is necessarily geographical also. This is practically synonymous with equality in taxation. It requires, not that all persons or all property shall be taxed, if any person or any property is, but that all persons similarly situated and all property of the same kind shall be proportionately taxed, if any such person or property is taxed. The subject whenever taxed must be taxed everywhere and at the same rate. If a commodity when sold is taxed, all sales of the same commodity must pay the same proportionate tax. It rejects taxation that is unequal as between taxpayers, even though not discriminating as between states.

For the sake of brevity these two meanings will hereafter be designated as "geographical uniformity" and "uniformity between taxpayers."

The meaning of this word "uniformity" as understood at the time of the adoption of the constitution is an important inquiry.

Uniformity as between taxpayers was no new or unknown principle in 1787.

Strabo, B. xiv., Chap. III, § 3, in speaking of the Lycians says they all contributed in the same proportion to taxes.

The Romans, during the siege of Veii, in Tuscany, 396 B. C., raised regular pay for their soldiers "by a general tribute assessed according to an equitable proportion on the property of the citizens." (Gibbon's Roman Empire, Vol. 1, p. 186.) And "unjust equality" in a Roman capitation tax was avoided by counting several indigent persons as one "head," while one wealthy person counted for several of these imaginary "heads." (2 Gibbon, 146.)

An edict of Charles VII of France (1445) required that equality (*égalité*) should be preserved between his subjects with regard to the charges and burdens which they had to support, so that no one might bear, or be compelled to bear, the burdens of another.

Collection des Économistes Financières,
Vol. 1, p. 208.

Montesquieu, in his *Esprit des Lois* (Livre XI, Chap. 19), 1748, commends a tax imposed by Servius Tullius, dividing the Romans into six classes and fixing a proportionate tax on each class, upon the ground that this equality (*équité*) in the levy of tribute went to the root of the fundamental principles of government.

Adam Smith (*Wealth of Nations*, published in 1776, book 5, Ch. 2, Pt. 2), says :

"All nations have endeavored to the best of their judgment to render their taxes as equal as they could contrive."

Boisguillebert (*Détail de la France*, Pt. III, Ch. 8), 1697, speaks of imposts justly spread over (*les impôts*

justement repartis), as being a law both divine and natural which is observed by all nations, even the most barbarous.

Vattel, in his *Law of Nations*, Bk. 1, Ch. 20, Sec. 240, page 111 (first published in England in 1760), lays down as an axiom that taxes

"ought to be regulated in such a manner that all the citizens may pay their quota in proportion to their abilities, and the advantages they may reap from society. All the members of civil society being equally obliged to contribute, according to their abilities, to its advantage and safety, they cannot refuse to furnish the subsidies necessary to its preservation, when they are demanded by lawful authority."

Burlamaqui, whose *Principles of Natural and Political Law* were published in England in 1748, in speaking (Vol. 2, Pt. 3, Ch. 5, Sec. 14) of the rules to govern taxes, says:

"The subjects must be *equally* charged, that they may have no just reason of complaint. A burden, equally supported by all, is lighter to every individual; but, if a considerable number be released or excused, it becomes much more heavy and insupportable to the rest. As every subject *equally* enjoys the protection of the government, and the safety which it procures, it is just that they should all contribute to its support in *proper equality*."

Adam Smith, in treating in his *Wealth of Nations* of the principles of taxation, 1776 (Bk. 2, Ch. 2, Pt. 2, p. 651), says:

"The subjects of every state ought to contribute towards the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expenses of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to

their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

Montyon (1733-1820) *Mélanges d'Économie Politique*, Vol. II, p. 476:

"L'égalité d'impôt qui fixe en ce moment nôtre attention, n'est pas celle qui doit exister entre les contribuables et entre les divers ordres de citoyens, mais l'égalité entre les provinces faisant partie d'un même état."

The equality of taxation this author here refers to is our "geographical uniformity," thus showing that the terms "equality" and "uniformity" were used interchangeably by French writers.

The distinguished French political economist and statesman Turgot (Comptroller General of Finance in France, 1774-1776) in his writing on taxes (published in 1757), Turgot, *Oeuvres Complètes*, Vol. I, p. 396, says:

Impositions Directes:

"Celle sur les personnes, par elle-même choque la raison; elle n'a jamais pu être imaginée que par la paresse et pour avoir plus tôt fait.

Il est impossible qu'elle soit *uniforme*.

Parcequ'il y a des gens qui n'ont rien," etc.

Here Turgot, in speaking of a direct tax on persons, clearly means by the word "uniform" uniformity between taxpayers, thus again showing that the French writers on taxation, with whom we must assume the framers of the constitution were much in sympathy, and with whose works they were, doubtless, very familiar, treat "equality" and "uniformity" as synonymous.

Other French economists who lay down the principles of equal taxation are: Quesnay, 1758; Condorcet, *Fixation d'impôt*, 1780; Mirabeau, *Théorie*

d'impôt, 1770, Jean-Baptiste Say, *Traité d'Économie Politique* ; Impôts Équitables.

These references, without pretending to comprise all such, are sufficient to show that uniformity or equality between taxpayers was in, and long prior to, 1787, recognized by statesmen, governments and economic writers as an established principle of the first importance in taxation.

The people of the different states (two—Massachusetts and New Hampshire—before the adoption of the Federal constitution) in defining the taxing power of their legislatures, have, almost without exception, inserted in their constitutions provisions giving effect to this principle, the different phrases used being: "Equal and uniform throughout the state," "Uniform upon the class of subjects," "Uniform with respect to persons and property," "Uniform and equal rate," "Uniform throughout the state" (Md.), "Proportional taxes," "Proportional and reasonable taxes," "Uniform rules of taxation," "Equalized and uniform throughout the state," "Uniform by general law" (Mo.), "Uniform as to all upon which it operates," "By uniform rules," "Uniform and ad valorem upon all property" (N. C.), "By uniform rule" (Ohio), "Under general laws and by uniform rules" (N. J.), "Uniform" (Oregon), "The rule of taxation shall be uniform" (Wis).

In many cases here "equality" and "uniformity" are clearly treated as synonymous

That it was so understood by the framers of the constitution is strengthened by the fact that when this clause was first proposed in the convention on August 25, by Mr. McHenry and Gen. Pinckney, the words "uniform and equal" were used, but the committee, to which it

was referred on that date, reported it back August 28, omitting "and equal," and this was accepted without debate. (Madison, Journal of Constitutional Convention; Elliott's Debates.)

They who confine this phrase to "geographical uniformity" feel the necessity of admitting that, independent of this clause, a certain degree of uniformity is involved in the word "tax" which Congress could not disregard by laying unreasonably discriminating taxes. But they fail to explain why an affirmative expression of this all important rule was omitted—as they claim it was—from the constitution.

Its framers were close students of the science of government and knew that it had long required uniformity between taxpayers as essential to proper taxation. Unjust taxation had for many years been uppermost in the minds of the people they represented. It was a large factor in leading them to declare their independence of England. These same people—so jealously did they guard the taxing power—had even endangered the success of their struggle for liberty by their refusal to confer upon the Confederation the right to levy taxes. Under these conditions it is incredible that—as some would have us believe—the statesmen who framed, and the people who adopted, the Constitution, intended to confer on Congress, in the very general terms used, the power to tax *without any limitation requiring uniformity among taxpayers.*

Several considerations make this seem more incredible. In the first place, the provision concerning "duties, imposts and excises" deals, not with the states—as in the case of direct taxes—but, like most of the provisions of

the constitution, directly with the individual citizens, and it is a fair inference that they were quite as much concerned in securing uniformity among taxpayers as "geographical uniformity."

Again, the underlying principle of the constitution and our institutions is that all men in their relations to the government and each other are, and are entitled to be, equal. This involves legal favors to none and equal opportunities (under the law) to all in the struggle for personal advancement and trade supremacy. "Geographical uniformity" has no tendency to insure this, while uniformity among taxpayers has.

By a tax of this character, sellers on exchanges—especially those who act only as brokers—are subject to a disadvantage in trade competition (equal to the amount of the tax), the tendency, if not the inevitable result, of which will be to destroy their business.

Furthermore, under the power to impose such a discriminating tax, exchanges, however much desired by or beneficial to the several states, can be driven out of existence. For example, the State of Illinois, believing the Chicago Board of Trade calculated to advance the best interests of its people, granted it a special charter. It has been a leading factor in making Chicago the great grain market that it is. It is an useful element in the internal trade of that state, a trade over which the state has exclusive control. Yet, if this power to impose the present discriminating tax be sustained, this commercial agency—approved and desired by the state—may be destroyed, whenever the agrarian spirit in other states shall grow sufficiently hostile to do so. For it is true—at least within limits which are sufficient, under the

small margins of profit now prevailing in trade—that the power to confine a tax to sales on exchanges implies the power to destroy such exchanges.

McCullough v. Maryland, 4 Wheaton, 431.

Weston v. Charleston, 2 Peters, 466.

Loan Association v. Topeka, 20 Wall., 655

Can it be assumed that the founders of this government contemplated this result?

Again, another purpose of prescribing uniformity in taxation undoubtedly was that thereby a way would be provided for preventing or righting any temporary injustice in taxation. An unjust tax which falls upon all of a class will generally be avoided, or if imposed, give rise to an effective demand for its repeal, while those affected by a partial tax will generally not be numerous enough to resist its imposition or secure its removal.

Again, a tax on a consumable commodity or its sale must be levied on all of that kind of commodity or all sales thereof, to make it fall within the definition of an indirect tax. This is defined to be a tax whose burden, while primarily borne by the one paying the tax, is ultimately (in the case of a tax upon a consumable commodity or its sale) included in the price to the consumer, and is thereby indirectly paid by him. But a tax upon some only of commodities of a particular kind, or upon some, but not all, sales thereof will not be included in the price to be paid by the consumer. The cost of production is a large if not ultimately the determining, element in fixing the price to the consumer. The cost of a commodity in its course to the consumer, as well as the cost of selling it,

is a part of this cost of production. But the cost of the commodity or of selling it, which is here involved, is not the cost in the expensive—that is, tax-incurring—market, but the cost in the cheaper—that is—tax-escaping market, just as the cost to the consumer of manufactured articles will be determined by the cost, not when expensively made by hand, but the cost when more cheaply manufactured by machinery. Hence, a tax upon a commodity, when sold in some markets, will not be included in the cost to the consumer, but this will be ultimately determined by the cost of the untaxed commodity and its sale in the cheaper—the untaxed—market. Not becoming a part of the price to the consumer, this tax upon commodities, when sold in some markets, therefore, falls upon the seller and becomes in its character a direct tax. Hence, uniformity—that is, a tax upon all commodities of the same kind, or all sales thereof—is required in the case of, and from the very nature of, an indirect tax upon consumable commodities, and Congress in conferring the right to levy such taxes must be held to have contemplated that kind of uniformity.

In two cases in this court, the meaning of this phrase has been involved:

In *United States v. Singer*, 15 Wall., 111, this court in overruling the objection that a tax on distillers was unconstitutional, because not uniform, said:

“The law is not, in our judgment, subject to any constitutional objection. The tax imposed upon a distiller is in the nature of an excise, and the only limitation upon the power of Congress in the exposition of taxes of this character is that they shall be ‘uniform throughout the United States.’ The tax here is uniform in its operation; that is, *it is assessed equally upon all manufacturers of spirits wherever they are.* The law does not establish

one rule for one distiller and a different rule for another, but the same for all alike."

In the *Head Money* cases, 112 U. S., 580, the constitutionality of an act of Congress requiring shipowners to pay a tax upon each passenger not a citizen brought from a foreign port into a port within the United States was attacked upon the ground that it was a tax, and as such was not uniform. The court held it was not the exercise of a taxing power, but of the right to regulate commerce, but added, if a tax it was uniform, saying :

"A tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

We respectfully submit that these cases, re-enforced by the able opinion of Mr. Justice Field on this point in the *Income Tax* cases (157 U. S., 592-96), present the definition of the phrase "uniform throughout the United States" which will best prevent unjust discrimination in taxes and best contribute to the future welfare of the people. As well said by Mr. Justice FIELD :

"If there be any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes should be in all respects uniform and impartial, it * * * should be resolved in the interests of justice, in favor of the taxpayer."

But accepting as the requisite, uniformity between taxpayers, its extent and application still remain to be further considered.

In the first place, be it understood that insistence upon such uniformity does not curtail the taxing power. Its enforcement will result rather in the increase of revenue, as it requires a larger number of taxable subjects.

Again, this kind of uniformity does not demand theo-

retical or perfect equality of contribution among taxpayers. Conceding this to be unattainable, it still demands practical uniformity between them. This restriction the people reasonably could—and as we contend, did—impose upon the power of Congress to tax. It does not deny to Congress the power to select the kinds and classes of persons or things to be taxed. It does not require that every person or thing shall be taxed if any are. While the Federal constitution does not—as many state constitutions do—confer the power to classify the subjects of taxation, the right of Congress to select the articles or subjects to be taxed is conceded. But this kind of uniformity does require that, in so selecting, all like things or persons similarly situated shall be included, and that there be some *essential difference* between the persons or things taxed and those escaping the tax. It does exclude discrimination without substantial difference.

See

Pacific Express Co. v. Siebert, 142 U. S.,
339-53;

Senior v. Ratterman, 44 Ohio St., 661,

where, in sustaining discrimination under state constitutions requiring uniformity among taxpayers, the courts found “an essential difference”—“a real tangible difference,” between the things taxed and those not taxed.

Unless this limit upon the power to classify exists and is enforced by this court, there are practically no limits upon the power of Congress to tax. The rule of uniformity as a limitation becomes meaningless and the power of this court to prevent unjust taxation or arbitrary discrimination is a mere shadow.

Uniformity between taxpayers as above defined, it is therefore insisted, is required by the constitution in all cases of indirect taxation.

The next question is whether the present tax, if an indirect tax, violates this rule of uniformity. Regarded as a tax on documents, it clearly does. It falls only upon the memoranda of such sales or contracts to sell as are made on an "exchange, board of trade, or other similar place." Memoranda of like sales, etc., made elsewhere escape the tax. Memoranda wherever made are taxed, if representing an exchange transaction. The locality has reference to the sales and not to the memoranda. No distinction can be drawn, either in form or substance, between the memoranda of sales, etc., upon an exchange, and memoranda of like sales made elsewhere—between the memorandum given by George R. Nichols on his sale of hams, and the memorandum he would have given if selling them in his office. Memoranda of sales not made on an exchange will always contain as much as the memoranda under this law are required to contain. *Between these memoranda themselves there is no appreciable distinction,* and uniformity requires that similar documents wherever found should be taxed.

Nor is there this essential difference between the taxed and untaxed things, if we regard the tax as upon the sale or contract of sale itself, rather than upon the memorandum of it. Such a tax, in the case of a cash sale, would be a tax upon the commodity itself when sold, and a commodity when sold on an exchange is the same thing as the same commodity when sold off an exchange. If not, it must be, not because the commodity itself is different—it is not—nor from the fact that it is sold—it is sold in either case, but because in the one case it is sold on an exchange and in the other it is not. Thus the only thing to differentiate the two things is the fact of a sale *on an exchange*. The same is

true of contracts to sell on an exchange and contracts to sell elsewhere.

But what is the feature which discriminates a sale or contract to sell hams, oats, etc., made upon an exchange from a sale or contract to sell such articles when made elsewhere? Certainly not the legal character of the sale or contract itself. The sale by James Nicol of two car-loads of oats, and the sale by George R. Nichols of ten tierces of hams, are, in their legal character, identical with sales of like quantities of hams and oats made elsewhere. Either is but an every-day exchange of commodity for price. All are enforced in the same courts and subject to the same remedies of the parties; a breach in either case is followed by the same consequences; the same rule of damages is enforced against the delinquent party. The legal status of the parties in the two present transactions is the same as it would have been, had they made their sales in their offices instead of on an exchange. Hence, as to the legal character of the sale or contract there is no difference.

The petition in the George R. Nichols case avers, and the Solicitor General's return in effect admits, that sales, etc., on an exchange are "identical in their character" with such sales, etc., made elsewhere.

But is not the only difference between a sale on an exchange and a sale off it a difference of place where made? But clearly the mere *locality* of the sale of the thing taxed is a purely arbitrary distinction, and does not make two otherwise like things different within the rule requiring uniformity. Congress could not, without violating this rule, tax persons doing business in a city and leave untaxed persons doing like business in smaller places, nor

tax only cigars smoked on exchanges or liquors consumed only in hotels. Nor could it tax sales of grain made on farms and leave untaxed like sales made in cities or on exchanges.

Schedule C of this act imposes a tax on various patent medicines. Could the act have taxed sales of such medicines when made in department stores and leave untaxed like sales made in drug stores? Such taxes would not "operate with the same force and effect in every place where the subject of it is found."

Nor can sales of like articles be distinguished for the purpose of taxation with reference to the facilities or convenience of selling in particular places. A sale in a town is more readily made than a like sale on a farm—a sale in a large city more readily than a sale in a small town. For in the small town as distinguished from the farm, in the large city as distinguished from the small town, there are more buyers, they are more accessible, and they give rise to more competitive bidding, the property is more conveniently handled, and the price is more easily collected because of better banking facilities.

The modern department store is usually conducted upon the plan of a large building owned or controlled by one person or firm, portions of which are sub-let to merchants in different lines of trade, thus by co-operation increasing the facilities of sale by securing economy in advertising, in rent, in delivery, in collection, in book-keeping, and in clerical force. But can it be seriously claimed that because of the better facilities for selling in the town over the farm, in the city over the town, in the department store over the ordinary retail store, a tax could be justified upon a sale in the town when a like sale on

the farm is untaxed, or on a sale in a city when a like sale in a town is untaxed, or a sale in a department store when a like sale in a retail store is untaxed? If not, how can a tax on sales on an exchange be sustained when like sales made elsewhere go untaxed. What is the thing that distinguishes such sales from sales in department stores?

A board of trade is only what its name implies, a place where for convenience business men meet to make with each other the same contracts and the same transactions they could, and frequently do, make in their offices and stores. A farmer may load his stock into a car and take it to the Chicago Live Stock Exchange, there place it (by the payment of a small yardage fee) in pens, and there sell it without charge, although not a member of the exchange. What this farmer thus gains is merely the convenience of selling in Chicago. Will that support this discriminating tax? If persons are to be taxed or go untaxed on their sales solely with reference to the convenience they enjoy in making them, where is it to end? A large corporation or trader always enjoys this advantage over a small one. May their sales for this reason be taxed while those of smaller dealers go untaxed? Is not this such offensive discrimination in the exercise of the taxing power as is well calculated to intensify class feeling, and deprive the citizens of that respect which is so essential to the permanence of any form of government?

We insist that this tax, whether a document tax or a tax on sales and contracts to sell, violates the rule of uniformity.

To conclude : This question of uniformity is one of more than ordinary importance. Its decision here will become a guide for the future, and, according as it is made, it will encourage or prevent an unjust exercise of the taxing power.

Unfortunately, the inequalities of life are becoming daily more marked. The feeling against property rights is one that the demagogue, especially in hard times, appeals to with surprising success. This success will become more marked and more injurious as the proportion of those who have not to those who have becomes—as it will—greater. If this hostility becomes controlling—as it may—in Congress, it will most readily find expression in the exercise of the taxing power. If, in the constitution and the decisions of this court construing it, there is no protection against unjust discriminating taxes, we may well fear for the future of property rights, if not for the future welfare and prosperity of this country and its institutions.

It is respectfully submitted that the present law should be adjudged unconstitutional in requiring these written memoranda and in imposing the tax in controversy, and that in *Nicol v. Ames* the judgment of the Circuit Court should be reversed and the appellant discharged, and in the original case in this court a writ of *habeas corpus* should issue to release the petitioner.

HENRY S. ROBBINS,

Counsel for Appellant and Petitioner.

JOHN G. CARLISLE,

Of Counsel.

FILED

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JAMES H. MCKENNEY,
Clerk

for 435 2d & Orig
Brief of Carlisle for App. v. For

Filed Dec. 10, 1898.
Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 435.

JAMES NICOL,

Appellant,

vs.

JOHN AMES, Marshal, &c.,

Appellee.

Appeal from Circuit Court,
Northern District of Illi-
nois.

No. 4, ORIGINAL.

Ex parte IN THE MATTER

of

GEORGE R. NICHOLS,

Petitioner.

Petition for Writ of *Habeas*
Corpus.

BRIEF FOR APPELLANT AND PETITIONER.

J. G. CARLISLE,

For Appellant and Petitioner.

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BRIEF FOR APPELLANT AND PETITIONER.

The sixth and seventh sections of the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, are as follows:

ADHESIVE STAMPS.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, *matters and things* mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

And there shall also be levied, collected and paid, for and in respect to the medicines, preparations, matters and things mentioned and described in Schedule B of this Act, manufactured, sold, or removed for sale, the several taxes or sums of money set down in words or figures against the same, respectively, or otherwise specified or set forth in Schedule B of this Act.

SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court.

The second clause of Schedule A, under the heading "Stamp Taxes," provides as follows:

Upon each sale, agreement of sale, or agreement to sell, any products or merchandise *at any exchange or board of trade, or other similar place*, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each

additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: *Provided*, that on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise *without a bill, memorandum, or other evidence thereof as herein required*, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, *without having the proper stamps affixed thereto*, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the Court.

In the case of Nicol (No. 435) the appellant was convicted and fined for making a sale of merchandise for present delivery to one J. H. Milne, on the Chicago Board of Trade, "without then and there making and delivering to the said James H. Wilson any bill, memorandum, agreement, or other evidence of the said sale showing the date thereof, the name of the seller, the amount of the said sale and the matter or thing to which it referred, as required by law;" and in the case of Nichols (Original No. 4) the relator was convicted and fined for making a sale of merchandise, for present delivery, to one Robert W. Roloson on the Chicago Board of Trade "without having the proper stamps affixed

to the said bill and memorandum for denoting the internal revenue tax upon the *said sale*, bill and memorandum, as required by law." In each case the party was charged with an intent to evade the provisions of the law, and in each the judgment of the Court ordered him to be committed to the county jail until the fine should be paid. In each case also the party making the sale was a member of the board and a resident of the City of Chicago, where the merchandise was then situated, and where it was to be delivered to the purchaser. It is not alleged in the information in either case that the accused party was a broker, or that he was acting for any one else in making the sale. The conclusive presumption, therefore, is that they sold their own property.

The first step to be taken in the presentation of these cases is to ascertain, if we can, what is the subject of the tax. The framers of the clause under consideration do not appear to have had a very definite idea of the particular thing upon which the tax was to be imposed, and consequently they endeavored to employ language sufficiently comprehensive to embrace everything connected with the transaction to which the tax relates. The tax is on the "*sale, agreement of sale, or the agreement to sell,*" and the law requires that on every sale, agreement of sale or agreement to sell, made at any of the places designated, a bill, memorandum, agreement or other evidence of the transaction shall be made and delivered by the seller to the buyer, to which there shall be affixed a lawful stamp or stamps "in value equal to the amount of the *tax on such sale.*" Is this a tax on the sale, and therefore a tax on the property, measured by its value as ascertained and fixed by the parties to the sale, or a duty on the privilege to make sales of products or merchandise at exchanges, boards of trade or other similar places, or is it a duty on the business or occupation or on consumption, or on the document used as evidence in the transaction?

The Circuit Court, in its opinion, delivered on the application of Nicol for a writ of *habeas corpus*, held that this was neither a tax on the sale nor on the business, occupation or document, but a tax on the privilege of making a sale "under special and exceptional conditions," and that it was an indirect or excise tax subject to the constitutional rule of uniformity, and was uniform because it applied to all sales, agreements of sale, or agreements to sell made at exchanges, boards of trade or other similar places wherever they might be located. On these points the Court said:

The sale referred to in this statute, being a sale of products or merchandise, must be made on an "exchange or board of trade" or at a "similar place," and the seller operating for the time being at such place or market must pay the tax. Dominion over the means of making a transfer or sale on a market which is known and established and provided with special safeguards and in a sense exclusive, rather than dominion over the thing sold for the mere purpose of alienation in general, is the subject-matter of the tax. The privilege of selling upon an exchange or board of trade may be thought of as distinct from the product or merchandise there sold or from a sale—merely as a sale—there made. This privilege is itself a property or thing of value, and it is upon the privilege of selling "at any exchange or board of trade" whenever such privilege is made use of, and not upon the sale apart from the privilege, or upon the occupation or business of selling apart from the privilege, or upon the product sold, or upon the price received for it, that the tax is levied. This tax is paid by means of a stamp or stamps put on a written document required by the law to identify each transaction and to receive said stamp or stamps. The document is merely an instrumentality for collecting the tax. The tax, as said, is not in reality and legal effect upon the document, or upon the commodity sold, or upon the sale *per se*, or upon the occupation of selling, but upon the privilege of selling products or merchandise at an exchange or upon a board of trade, for, apart from this privilege, there is in the particular law here complained of no tax.

The privilege in question is taxed according to the

use made of it. The tax is graduated in proportion to the magnitude of the deal or operation. On every occasion when the privilege is used the owner thereof, himself conducting the sale, pays the tax. If he sell for some one not a member of the exchange or board of trade he will still pay the tax, even though he collect the amount, or some portion of it, from his patron as a charge incidental to the service rendered, for while the privilege taxed is his own property, the patron or employer enjoys to some extent the benefit resulting from the use of the privilege, but this tax amounts in reality to an expense in transferring commodities from the producer to the ultimate consumer. The latter, in the last analysis, foots the bill; the tax is absorbed in the ultimate cost, and the consumer eventually pays it. Therefore this tax, being a case of what may be called indirect taxation, is, as contended by petitioner, subject to the constitutional limitation of uniformity "throughout the United States," but this tax, in my judgment, falls within the rule of uniformity. That rule is met if a tax operates equally upon the specified subject matter wherever and whenever found throughout the United States. It is for the law-making power to determine the incidence of taxation—that is, upon what matters the tax shall be levied—as well as to provide the means or instrumentalities whereby the tax shall be collected. The tax in question applies whenever and wherever throughout the United States the privilege of selling products or merchandise on an exchange or board of trade or similar place is exercised, and it is graduated, as said, according to the use made of the privilege. That such a privilege is taxable seems to me plainly the teaching of the text books on taxation, nor do I understand that this proposition is or will be disputed by the learned counsel for this petitioner.

What is the privilege upon which this tax is supposed to be laid? If it is the privilege stated by the Court, it is precisely the same privilege that every man has to transact business in his own house or in his own office, under such regulations as he may chose to make. The Board of Trade of the City of Chicago is a private corporation, but the privilege of buying and selling merchandise is not conferred upon

the corporation or upon its members by the act of the Legislature. The corporation as such neither buys nor sells. By the act of incorporation it is expressly provided that "said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the *management* of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill," Sec. 12. The powers conferred by the preceding sections of the act all relate to the election of officers, the admission and expulsion of members, the appointment of committees and other matters pertaining to the government and control of the corporate affairs. The power to carry on the business of buying and selling merchandise or other property is not mentioned in the act nor is it included by implication in any of the powers granted; and besides, the tax is not imposed upon the corporation, but upon the persons who make sales or have sales made at the place controlled by the corporation. Nor is the tax exacted from those only who sell at an incorporated exchange, board of trade, or other similar place. It must be paid on account of all sales made at "any" exchange, board of trade, or other similar place, although it may be an unincorporated voluntary association of individuals carrying on the business of buying and selling products or merchandise, in a building or at a place owned and controlled by themselves exclusively. Many exchanges, boards of trade and "other similar places" belong to this latter class, and they are all included in the sweeping provisions of the statute.

Moreover, the payment of the tax is not limited to sales, agreements of sale, or agreements to sell made by members of exchanges, boards of trade, or other similar places, for or on their own account, but is exacted from every producer or owner of property for whom a sale, agreement of sale, or agreement to sell is made there, whether he be a member or not.

It requires no argument to show that neither the members nor other persons derive their right or privilege to buy and sell merchandise from an act of incorporation or any other statute, or that the exercise of this right or privilege is not dependent to any extent upon a legislative grant. But it is contended that the privilege, or the opportunity—for there is no exclusive privilege—of the citizen to sell his products at a particular place, or to have them sold by a particular individual, or class of individuals, is a substantial thing that may be taxed, and is in fact taxed in this instance. It may be a benefit to the owner of goods to sell them or have them sold at an exchange or board of trade, just as it is a benefit to sell them or have them sold in a town or city where purchasers are numerous and the markets are known rather than in the country where the demand is limited and the markets not regularly established; but in neither case can it be properly said that there is such a privilege as to constitute a property or thing susceptible of identification and valuation, and subject to taxation by the United States. Any owner of property may have it sold at an exchange or board of trade if he chooses, and his right or privilege to have it so sold is in no respect different in its nature or in its use from his right or privilege to have it sold in any other market.

If a tax or duty can be imposed upon such a right or privilege, a new field for the exercise of the powers of taxation has been discovered, which political economists and legislators have not yet explored, and in cases of emergency we may expect hereafter to see all the commercial and industrial facilities of the people put under contribution for the support of the government. But we do not think the act is fairly susceptible of such a construction. A duty of twenty dollars is imposed by the second section of the act upon the privilege or occupation of commercial brokers, and they are defined as persons or firms "whose business it is as

brokers to negotiate sales or purchases of goods, wares, produce, or merchandise, &c." By another clause a duty of ten cents is imposed upon every broker's "note, or memorandum of sale of any goods or merchandise, &c." It thus appears that, independently of the clause in controversy, the act imposes a duty on the privilege or occupation and a duty on the document, and it is not to be presumed, in the absence of a plain provision to that effect, that Congress intended to impose another charge upon either the one or the other. It seems to us that there is as much reason for insisting that the stamp duty of ten cents on a broker's note or memorandum is a duty on the privilege as there is to insist that the duty imposed in these cases is on the privilege, because, although the value of the thing sold does not in one instance affect the amount of the duty, the privilege of making the sale, if it be a privilege, is of the same nature in both; that is, the owner of the property has the benefit of the broker's experience and of his facilities for reaching the market.

In the case of the "Succession Tax" *Scholey vs. Rew*, 23 Wall., 331, this Court held that the tax was not upon the land, or upon the estate in the land, but "upon the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed or laws of descent, from whom the interest of the successor has been or shall be derived"; and again, the Court said that the subject matter of the assessment was "the devolution of the estate, or the right to become beneficially entitled to the same, or the income thereof in possession or expectancy." In a very recent case, *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S., 283, involving the constitutionality of a State legacy and inheritance tax law, the Court said: "The right to take property by devise or descent is the creation of the law, and not

a natural right—a privilege, and, therefore, the authority *which confers it* may impose conditions upon it.” And in the case of *Pollock vs. Farmers’ Loan and Trust Co.*, 157 U. S., on page 578, this Court, in commenting on the case of *Scholey vs. Rew*, said that “the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the Court,” an intimation, as we understand it, that if that point had been considered the validity of a tax laid by the United States on successions might not have been sustained. But however this may be, the right or privilege held to be taxable in that case was one created by law, and not a mere benefit or advantage secured by the skill or enterprise of the owner of property. It was a tax on the privilege of acquiring property by the mere operation of law, or by a mode of transmission authorized and prescribed by law, while this, if it is a tax on a privilege, as held by the Court below, is upon the privilege of the citizen to dispose of his own property at a particular place, a thing which he has a right to do independently of any legislation.

There is no doubt that the several States have the power, within certain limitations, to impose taxes upon such corporate and other granted franchises and privileges as constitute property rights, but we are not aware of any case, State or federal, in which it has been held that the mere privilege or opportunity to sell property, or to have it sold, at a particular place, is a subject for taxation. It is in fact a mere option belonging to every member of the community to sell his goods, or to have them sold, in an established market, and if it is taxable upon the ground that “it may be thought of as distinct from the product or merchandise there sold or from a sale—merely as a sale—there made,” then the privilege of selling in a city having a certain number of inhabitants, or in a market where a certain amount of business is

done, or any similar option or privilege, may also be taxed by the United States or by the State.

But it will be argued that a member of an exchange, board of trade, "or other similar place," possesses a privilege "in a sense exclusive," as said by the Court below, and that such a privilege is taxable and has been taxed under the law we are considering. It cannot be seriously claimed that there is an exclusive privilege conferred by law, or otherwise acquired, to buy and sell products or merchandise generally, nor to buy and sell any particular kind of product or merchandise, but simply a privilege, which any one may secure, to buy and sell at a particular place—a place which belongs to the member and his associates and is rightfully in their possession and under their control. The privilege, or opportunity, is acquired simply by associating himself with others, and becoming, in common with them, the owner or temporary proprietor of the place where his private business, or a part of it, is transacted. It is not conferred by law, and it cannot be taken away by law. The repeal of the charter of the Board of Trade of the City of Chicago, while it would affect the organization in other respects, would not affect this privilege in the least. The members could lawfully continue to carry on the business of buying and selling at the same place, and no one else could carry on business there without their consent. The privilege is, therefore, in no respect different from that of an attorney to transact business in his own office or of a merchant to buy and sell at his own store.

Membership of an exchange, board of trade or other similar place is not an occupation or profession, and if it were, it is not claimed that this is a tax upon the occupation or profession.

Taxes upon corporate franchises or privileges are not laid upon the right or privilege to do business, but upon the right to be bodies corporate, and it would seem from numerous expressions in opinions of this Court that such a tax can be imposed only

by the authority that created them. In *Home Ins. Co. vs. New York*, 134 U. S., 594, the Court thus defined a taxable corporate franchise or privilege:

“By the term ‘corporate franchise or privilege,’ as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial purposes) the right or privilege given by the State to two or more persons of *being a corporation*, that is, of doing business in a *corporate capacity*, and not the privilege or franchise which, when incorporated, the company may exercise. * * * It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability.” See also *Horn Silver Mining Company vs. New York*, 143 U. S., 305. A tax imposed *eo nomine* upon this franchise or privilege does not necessarily become a tax upon the corporate property or business, simply because the amount of its capital stock or the amount of business transacted, is made the basis of the valuation of the franchise or privilege; but a tax on capital stock as such is a tax on the property in which it is invested, and a tax on the gains and profits derived from the use or sale of property, or a tax on gross receipts from sales, is equivalent to a tax on the property itself, as we think is now conclusively established by the decisions of this Court. Now, the individual members of exchanges, boards of trade and other similar places, enjoy none of the franchises of a body politic; they transact their business in their individual names and upon their individual responsibilities in the same way precisely as the same kind of business is transacted by those who are not members of such organizations, and the mere fact that they enjoy special facilities, created by themselves, does not endow them with a taxable franchise or privilege. If a privilege is taxed under the clause we are con-

sidering it must be decided what particular or special privilege it is. It must be, according to the view of the Court below, not merely the opportunity to buy and sell at a particular place, but the privilege of being a member of an exchange, board of trade, or other similar place, because the opportunity to buy and sell there in person is only an incident or result of the membership; it is, in other words, the advantage or benefit secured by reason of the membership.

The Court below says: "Dominion over the means of making a transfer or sale on a market which is known and established and provided with special safeguards, and in a sense exclusive, rather than dominion over the thing sold for the same purpose of alienation in general, *is the subject of the tax.*" It will be seen at once that this definition of the thing taxed applies only to sales made by members of the organization, because they are the only persons who have dominion over the means of making transfer or sale on that market. But under the law the non-member who sells his products or merchandise, or who has them sold there, and who has no such dominion as that described, is required to pay the same tax or duty as a member. What is the thing taxed in his case? While the definition given by the Court is not sufficiently comprehensive to include all the features of the law, it nevertheless embraces the cases of the parties to the particular transactions involved in these proceedings, and shows that in the opinion of the Court, although not expressed in direct terms, the tax is imposed upon the privilege of being a member, because, as already stated, it is membership alone that confers the dominion over the means of transfer or sale.

Does the right to be a member of such association, whether incorporated or unincorporated, constitute a franchise or privilege taxable by the United States? If so, do such rights constitute a distinct group or class of franchises or privileges which may be separated from all others, and subjected to

excise taxation as a distinct group or class? Not only must these questions be answered in the affirmative in order to sustain the view taken by the Court below, but it must also be determined that it was the purpose of the law to tax the privilege and not the sale or the consumption, or the occupation or business, or the written evidence of the sale or agreement. If such was the purpose it is impossible to understand why the tax was not imposed upon the *entire* privilege including the right to buy, instead of being limited to that part of the privilege which is exercised in making sales, agreements of sale, or agreements to sell "products or merchandise." Moreover, bonds, stocks and choses in action of various kinds are daily bought and sold at exchanges and similar places, by the same persons who buy and sell products and merchandise, and in buying and selling the bonds, stocks, and other choses in action, they exercise precisely the same privilege and enjoy precisely the same advantages as when they buy and sell products or merchandise; and yet no duty is imposed on account of the sales or agreements in one case while an onerous tribute is exacted from the producer or owner in the other. But we will have occasion to refer to this feature of the law hereafter, and mention it now only because it conduces to show that it was not the intention of Congress to impose the duty on the privilege, but on the sales of particular kinds of commodities.

This tax is paid by the owner of the property no matter whether he is or is not a member of an exchange, board of trade, or other similar place, and it is not, as was erroneously assumed by the Court below, shifted to the purchaser and ultimately paid by the consumer. If all sales, or agreements of sales, or agreements to sell products or merchandise, wherever made, or all evidences of such sales or agreements, wherever made, were subject to a tax or duty, at the same rates, the tax or duty might be included in the price of the article and ultimately be

paid by the consumer; but when only such sales or agreements, or the written evidence of such sales or agreements as are made at particular places in the country, are subjected to the tax or duty, the open market in which untaxed sales and agreements are made fixes the prices of the articles, and the seller in the taxed market must lose what he pays. And this rule is inexorable and invariable when, as in the present case, only a small proportion of the products or merchandise in the country is sold in the market where the tax or duty is exacted.

This is a tax, therefore, which directly affects the value of the property in the hands of the owner, who is not the consumer but the seller, and is a charge on the property simply because it is sold, or contracted to be sold, at a particular place, and not merely a duty on the privilege or on the business or occupation, or on the bill or memorandum.

In *Le Loup vs. Port of Mobile*, 127 U. S., 645, this Court said, "Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing business is surely a tax on the business"; and in *Melton vs. Missouri*, 91 U. S., 279, it was said: "Where the business or occupation consists in the sale of goods, the license tax required is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but if such a tax conflict with any power vested in Congress by the constitution of the United States, it will not be any less invalid because enforced through the power of a personal license." In *Philadelphia Steamship Co. vs. Pennsylvania*, 122 U. S., 326, it was contended in the argument that a tax on gross receipts was a tax on the franchise or privilege, but the Court held that it was a tax on the business of carrying on interstate commerce. The Court referred to and approved the decision in *The*

State Freight Tax Case, 82 U. S., 232, and said: "A tax upon fare and freights received for transportation is virtually a tax upon the transportation itself." In *Fargo vs. Michigan*, 121 U. S., 230, it was decided that a tax on gross receipts for carrying freight and passengers in or out of the State, or through the State, was a tax on the commerce from which the receipts were realized. The fact that these cases, and many others affirming the same rule, involved questions concerning the power of the States to regulate or interfere with interstate commerce, does not in any manner affect their application to this controversy, because in each of them, the first question necessarily was—upon what particular thing has the tax been laid? And in determining this question the phraseology of the law is not controlling. The Court will always ascertain if possible upon what particular thing the charge actually falls, and in doing so, it will, if necessary, disregard the verbiage of the law and reject all legislative devices to conceal the real nature and purpose of the tax. As the Court said in *Robbins vs. Shelby Co.*, 120 U. S., 487: "The mere calling the business of a drummer a privilege does not make it so." In the present instance, however, as already stated, the statute does not purport to impose a duty upon the franchise or privilege, but expressly lays a tax upon the "sale, agreement of sale, or agreement to sell." If this is a tax on the sale, measured by the value of the thing sold, it is a tax on the property, and is therefore direct and subject to the rule of apportionment. Instead of requiring a formal official assessment, as is sometimes the case, or a sworn list or return, as was required in the case of the income tax law, the value of the property is ascertained in the present instance by reference to the amount for which it is sold, and it is taxed on that amount every time it is sold. "Bouvier defines assessment to be determining the value of a man's property or occupation for the purpose of levying a

tax." *People vs. Weaver*, 100 U. S., 539. In the absence of constitutional restrictions, the government which has the right to impose the tax, may adopt any method of assessment, or valuation it chooses, provided it is uniform among the classes to which it applies, and in this case it has chosen to adopt the valuation placed upon the property by the parties to the sale, and to make that the sole basis of the taxation.

The manner in which the tax is required to be paid does not affect its character in the least. If the act of August 28, 1894, which required every person of lawful age having an annual income exceeding a certain amount to make a verified list or return, had provided that the tax of two per cent. on the sum in excess of four thousand dollars should be paid by affixing an adhesive stamp to the list or return, would the character of the tax have been altered by such a provision? Would it have been converted from a direct tax on the property from which the income was derived, into an excise duty on the privilege of earning it, or on the occupations of the people, or on the document signed and sworn to by the taxpayer? Such a question requires no discussion. The method of payment or collection is a mere matter of convenience and detail, and may be varied from time to time without changing either the nature or the rate of the tax or duty. Formerly the duty on distilled spirits, malt liquors and other articles of consumption were paid directly to the collectors in money upon reports of the quantities manufactured and sold, but in 1868 the law was so changed as to require the payments to be made by affixing stamps, but it was never supposed that the real nature of the duties was altered by this legislation.

Another clause of Schedule A imposes a duty on the document, evidencing the sale, as follows:

"Contracts—Broker's note, or memorandum of sale of any *goods or merchandise*, stocks, bonds, exchange, notes of hand, real estate, or property of

any kind or description, issued by brokers or persons *acting as such*, for each note or memorandum of sale, not otherwise provided for in this act, ten cents." This clause does not require the broker or other person acting as such to make a note or memorandum of the sale, but simply imposes the duty if a note or memorandum is voluntarily made in the course of the business. Bills or memoranda of sales made by brokers and others acting as such are otherwise provided for in the act, if the tax or duty in controversy is imposed on the bill or memorandum and not on the sale or consumption or on the privilege, occupation or business. What we mean to say is, that if the duty under both clauses is imposed on the document only, both duties cannot be exacted, because they impose different rates and apply to documents executed under different circumstances; but if the tax or duty in controversy is imposed on the sale or on the privilege, or on consumption, or the business or occupation, it is evident that both may be collected—the tax of ten cents on the bill or memorandum under the clause last quoted, because the sale or agreement to sell was made by a broker or person acting as such, and another tax or duty, under the other clause, of one cent on such hundred dollars worth of products or merchandise sold or agreed to be sold on account of the sale, or on account of the privilege, or on account of the occupation or business, because the sale or agreement was made at an exchange, board of trade or other similar place. It should be observed also in this connection that the tax or duty in question, while it applies of course to the sales and agreements made by brokers and others acting as such, if made at any of the places specified in the act, extends beyond that class of sellers, and embraces all sales and agreements made personally by the producers and subsequent owners of products or merchandise if made at such places. It does not therefore purport to be a tax on the privilege, oc-

cupation or business of brokers or others acting as such, nor does it, by its terms, purport to be a tax on documents used by brokers or others acting as such, but appears to be a tax on the sale regulated by the value of the property sold, and in order to facilitate the collection of the tax on the sale or agreement the law expressly requires the seller, under a severe penalty, to make a written bill or memorandum of the transaction and affix a stamp to it "in value equal in amount to the tax on such sale." It is not to be presumed that Congress has attempted to compel the citizen to create something merely for the purpose of taxing it, but surely that is just what has been attempted if the tax is on the bill or memorandum.

The official construction of the law is that both the taxes or duties to which we have referred must be paid in all cases where the sale or agreement is made by a broker at an exchange, board of trade or other similar place, and that the one cent on each one hundred dollars' worth of products or merchandise sold is a tax on the sale to be paid by the owner of the property. This ruling was promulgated on the 5th day of November, 1898, and is as follows:

"That in case of a broker who is a member of the Board of Trade negotiating a sale of grain or produce on the Exchange as a broker for a principal, the principal afterwards assuming the trade, the broker is required to deliver and pay a ten-cent tax on his note or memorandum of sale, and the principal is required to pay a tax *on the sale* at the rate of one cent on each \$100 of the amount or fractional part of \$100 in excess of \$100."

There are, therefore, two separate and distinct taxes or duties imposed upon different things, but both connected with the same transaction. First, a tax of ten cents on the note or memorandum of the sale or agreement made by the broker or person acting as such; and secondly, the tax on the sale regulated by the value of the thing sold. If the tax is really

imposed on the sale, the official construction that both payments must be made, is undoubtedly correct, but if it is on the document the construction is clearly incorrect, because it imposes double taxation. *Cooley on Taxation*, 227.

The cases bearing upon the question of direct and indirect taxation have been so recently collated and reviewed by this Court that we do not consider it necessary to cite them in detail. In *Pollock vs. Farmers' Loan and Trust Company*, 157 U. S., 427, a majority of the Court, after a careful examination of the authorities, decided that a tax on the rents, issues and profits of real estate was a tax on the real estate, but there was an equal division of opinion on the question whether the tax or duty imposed by the Act of August 28, 1894, on the incomes derived from other sources, conformed to the rule of uniformity, and consequently there was no decision on that point. In the course of the opinion it was said, "We admit that it may not unreasonably be said that logically, if taxes on the rents, issues and profits of real estate are equivalent to taxes on real estate, and are, therefore, direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes." And upon the rehearing of the case, 158 U. S., 601, after a re-examination of the judicial and historical authorities, it was expressly held that "taxes on personal property, or on the income of personal property, are likewise direct taxes." On the first hearing the Court said, "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes." 157 U. S., 558. In the case of *Maine vs. Grand Trunk*, 142 U. S., 217, decided in 1891, the Court, speaking of excise taxes, said: "The desig-

nation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular functions. It is used more frequently in the latter sense than in any other." While these definitions may not be strictly adhered to since the recent thorough re-examination of the subject in the light of the practice and understanding at the time the constitution was adopted, still we suppose it cannot be disputed that duties uniformly laid on all articles of consumption of the same kind, and primarily paid before the articles reach the consumer, are indirect taxes or excises, because their amount can ordinarily be included in the price and shifted to the last purchaser, who is not compelled to pay them unless he chooses to buy and use the articles; but we think it is clear that taxes imposed upon a part only of the articles of the same kind, though they are articles of consumption, and which the owner is required to pay as a condition upon which he is allowed to sell his property, are direct taxes, because they are a charge upon the property which the owner is compelled to pay, and they cannot be added to the price and be ultimately paid by the consumer. Such taxes are paid primarily and finally by the owner at the time he parts with his property, and are not taxes on consumption. The right of the producer or subsequent owner of property to sell it or have it sold at an exchange, board of trade or other similar place, is just as perfect as his right to sell or have it sold anywhere else, and therefore, when it is declared by law that he shall neither sell it himself nor have it sold at such places without the payment of a tax on its value, it is a condition imposed upon his right of alienation which makes the payment of the tax compulsory upon him. "The power of alienation of property is a necessary incident to the right of

property." 2 Kent, 326. Certainly no man is compelled by law to so use his real or personal property, or to so invest his money, as to make it yield an income, but he has a right to do so and must do so or deprive himself of a large part of the value of his possessions. Nor is the owner of produce or merchandise actually compelled by law to sell it at an exchange, board of trade or other similar place, but he has a right to do so, and he has the same reason for doing so that any other owner of property has for making a profitable use of his lands, goods or money.

In determining the character of this tax, the Court must consider the effect of the whole law under which it is imposed, in order to see how the taxpayer and his property are affected. Whether the burden of a particular tax can or cannot be shifted, is a question of fact, dependent upon the practical operation of the law in each case. It requires no extraneous evidence, however, to satisfy a court that if the same article is taxed when produced or sold at one place and not taxed when produced or sold at another place in the same locality or market, the owner can not possibly charge the amount of the tax to the purchaser. An attempt to do so would terminate his business at once, and this, in our opinion, is the very result which this clause of the statute was intended to accomplish.

The cases in which this Court has held that a tax on sales, or a tax on the privilege to make sales, or on the occupation of selling, or on the proceeds of sales, or on the gains and profits realized from sales, or on the receipts from a business, is equivalent to a tax on the thing sold or on the business transacted, are so numerous that it would be tedious to review them. Beginning with *Brown vs. Maryland*, 12 Wheat., 419, and ending with *Pollock vs. Farmers' Loan and Trust Co.*, 158 U. S., 601, the Court has considered these questions in nearly all their aspects and in

their application to a great variety of circumstances, and its judgments, especially in the Income Tax Cases, are conclusive that, if this is a tax on sales based upon the value of the property sold, it is equivalent to a tax on the property itself, and is a direct tax within the meaning of the constitution. Surely if a tax on the income—the gains and profits—derived from the use or sale of personal property, is direct, a tax on the entire proceeds of a sale of such property must also be direct. The reasoning of the Court in the two cases last referred to and the conclusions reached necessarily include such taxes in the class of direct taxes, when they are imposed according to the value of the thing sold. This is not a specific tax or duty on articles of consumption, but a tax on sales or agreements to sell “any products or merchandise,” whatever may be their character, made at an exchange, board of trade or other similar place, and the amount of the tax in every instance depends entirely upon the value of the products or merchandise sold or agreed to be sold. In the case of *Hylton vs. United States*, 3 Dall., 171, a specific tax was imposed upon carriages varying in amount according to their character, not according to their value, and it was held to be a duty and not a direct tax, but upon what distinct ground the decision was based it is difficult to determine from the report. The case was altogether unlike the present in another respect—the tax was required to be paid only by the owner of carriages kept for use or hire, not by every owner through whose hands it might pass in the course of trade.

It is not necessary in order to make a tax direct within the meaning of the constitution that it should be imposed on all the property of all the people, nor that all the particular kinds of property taxed should actually exist in all the States; and we are therefore unable to appreciate the force of the argument concerning apportionment, which so largely influenced the

judgment of Mr. Justice Iredell in the Hylton case. Under the constitution it is the whole tax—the whole sum to be raised—that is to be apportioned “according to the census or enumeration,” and it is not required to be apportioned upon or among the different kinds of property subject to taxation by the act imposing the tax. Nor is it required to be apportioned among the States and Territories according to the amount or value or character of the taxable property in each. It is true that if an apportioned tax should be imposed upon sales of products or merchandise made at an exchange, board of trade, or other similar place, and everything else should be exempted from taxation, it would operate very unequally, because very few such sales might be made in some States and Territories, and a great many might be made in others; but this, while it may constitute a forcible argument against the wisdom or policy of such an act, would be no argument at all against its constitutionality. In the case of slaves, such an act as we have indicated would have entirely exempted the people from direct taxation in more than half the States, and yet slaves were included, without question, in every direct tax law enacted prior to the beginning of the civil war. The first direct tax law enacted imposed taxes upon dwelling-houses, lands and slaves; dwelling houses and lands were taxed upon a valuation or assessment, while slaves were taxed *per capita*. The general direct tax laws of 1813 and 1815, and the special act of 1815, which applied only to the District of Columbia, imposed the taxes on lands, building and slaves, but the act of 1861 omitted slaves. So far as we know it was never contended that a tax upon slaves, whether laid *per capita* or upon a valuation or assessment, was not a direct tax under the constitution.

Some confidence must be reposed in the judgment and discretion of the legislative department, and it is not to be presumed that it would attempt to impose the whole sum to be raised by a direct tax upon

a single kind of property unless it existed substantially to the same extent throughout the United States. However, the rule of apportionment based upon the census or enumeration is necessarily a rule of inequality in its operation upon the taxpayers and their property, and consequently the degree of inequality that might result in a particular case cannot be properly considered in determining whether that rule can or cannot be constitutionally applied. The questions of apportionment and equality, therefore, have no bearing upon the inquiry whether a particular tax is, or is not, direct. The result of such an inquiry must depend upon the tax itself, and its effect upon the property on which it is imposed. If it is so laid that, directly or indirectly, it becomes a charge upon the property itself so as to diminish its value in the hands of the owner to the extent of the tax, and is not merely a charge upon the individual for consuming or using the property, it is a direct tax.

If we are correct in our contention that this is not a tax on a privilege, and the Court should be of the opinion that it is not a tax on the sale and consequently equivalent to a tax on the property, then it is a duty, excise or impost on consumption, or on the business or occupation, or on the bill or memorandum which constitutes the evidence of the sale, and is subject to the constitutional rule of uniformity as well as to the general rule of uniformity and equality which modifies all power of taxation in this country. The constitutional requisition is not satisfied by a mere geographical uniformity in the sense that it is necessary only to apply the same rule or method of taxation in each State, no matter whether the taxation itself is uniform or not. It is not the rule that is required to be uniform, but it is the taxes, the charges upon the people and their property that must be uniform "throughout the United States." The language of the Constitution is, "but all duties, imposts and excises shall be uniform throughout the United States";

that is, anywhere in the United States—at every place in the United States. The language could not be made plainer than it is, and the grounds of the contention that duties, excises and imposts that are not uniformly laid are unconstitutional if the lack of uniformity does not exist in every State and Territory, but are strictly constitutional if the lack of uniformity does exist in every State and Territory are, to say the least, somewhat difficult to understand. This construction would sanction the grossest discriminations in taxation upon the same articles of consumption, the same privileges and occupations, and the same kind of documents, provided the same discriminations were made in each State and Territory.

The power to impose duties, excises and imposts extends to every part of the United States, and wherever the power extends, the rule prescribed for its exercise must extend also. This clause of the constitution has no reference to State lines or to political divisions or sub-divisions. Duties, excises and imposts are laid in the Territories and in the District of Columbia as well as in the States, and wherever laid the rule of uniformity applies and must be observed, or the act imposing them will be invalid. If imposed at all they must be imposed upon the same things or classes of things at every place within the jurisdiction of the United States, and the constitutional rule cannot be disregarded in the State of Illinois, simply because it is also disregarded in all the other States. To hold otherwise would be equivalent to the assertion that the people of the States in adopting the constitution had repudiated the principle of uniformity and equality among taxpayers and their property which had theretofore been everywhere recognized as an essential element in all forms of just taxation, and substituted in its place a new rule which required simply that the violations of the rule of uniformity and equality should be uniform in all the States of the Union. This great power of taxation was

granted reluctantly to the general government, and it would require very explicit language in the constitution to justify the conclusion that there had been granted along with it a power to exact unequal and unjust contributions from the people in any part of the country.

On the contrary, the object of this provision of the constitution evidently was to secure an equal distribution of the burdens imposed by that class of taxes upon the people and their property. This was the general purpose, but as there are many different kinds of taxable property and privileges and occupations in the country, and as all men do not own or use the same kind of property or possess the same kind of privileges, or follow the same occupations, the general rule of uniformity has to be so modified in its practical application as to require simply that the same rates shall be imposed upon the same things, or classes of things, no matter who owns or uses them or at what place in the United States they are owned or used. The rule does not require the imposition of the same duty, excise or impost upon a pound of tobacco that is imposed upon a pound of mixed flour, nor the same rate upon a deed for real estate as upon a check for the payment of money, but it does require that the same rate shall be imposed upon all tobacco of the same kind, upon all mixed flour of the same kind and upon all deeds and checks of the same kinds, wherever the property may be situated, or wherever the documents may be executed. If it does not require this much at least, it wholly fails to accomplish any part of the purpose for which it was intended, and is utterly worthless as a protection against unequal taxation.

Mr. Justice Field in his separate opinion in the case of *Pollock vs. Farmers' Loan and Trust Co.*, 157 U. S., 429, correctly stated the meaning of the rule when he said: "The uniformity thus required is the uniformity throughout the United States of

the duty, impost or excise, levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done" (pp. 592, 593).

Granting that Congress may classify articles of consumption, occupations, &c., for purposes of taxation under the power to lay duties, excises and imposts, still the classification must not be arbitrary, but must be based upon some substantial difference between the things included in the several classes. Things of the same nature and use must be classed together and subject to the same rate. There must be such differences as "bear a just and proper relation to the attempted classification" *Gulf, Colorado and Santa Fe Railway vs. Ellis*, 165 U. S., 150; *Bells Gap Railroad vs. Pennsylvania*, 134 U. S., 232; *Magoun vs. Illinois Trust and Savings Bank*, 170, U. S., 283. Surely it cannot be said that the subjects of taxation can be properly classified according to the places where they were produced or sold, or where the occupation or business may be carried on, or where the document may be executed, unless the particular place where these things are done, actually affects the character or use of the thing taxed. The Court below correctly held that the tax or duty in controversy in these cases was imposed simply because the sales or agreements to sell were made at a particular place. It is not even intimated in the opinion that there is any difference between the products or merchandise sold by the petitioner and appellant on the board of trade, and products or merchandise of the same designation sold by other persons at other places free from taxation; but it is said that there are certain advantages or benefits enjoyed in making sales or agreements to sell at exchanges, &c., which do not generally exist elsewhere. This may be true; but, as we have al-

ready said, the same advantages and benefits are not enjoyed to an equal degree in all the other markets of the country, and we submit that if the differences between the markets in this respect constitute a sufficient reason for the imposition of different rates of taxation upon the articles sold in them, or upon the business conducted or on the documents used in them, the rule of uniformity is a delusion. Uniform markets would be necessary in order to secure uniform taxation.

This is not an impost on consumption, because such imposts are paid by the consumers, which is not the case here, as we have endeavored to show; but even if it be assumed that it is such an impost, it is not uniformly laid. Familiar instances of imposts on consumption are found in our statutes, imposing duties upon imported goods and internal revenue taxes upon distilled spirits, malt liquors, manufactured tobacco, cigars and other articles. These duties and excises are paid to the government in the first instance by the manufacturers or other producers, or by the importer, and they are imposed at uniform rates upon all articles of the same kind, wherever manufactured or produced or sold, or to whatever place they may be brought from abroad, and they are added to the price and paid by the last purchaser or consumer. It will not be disputed that the articles subject to taxation under the laws referred to are "products or merchandise," and as such are embraced in the act of June 23, 1898. Up to the time when that act took effect, those articles, or the consumers of those articles, were subject to only one duty or excise; but since that time, if the act is constitutional, they are subject not only to the tax imposed by the former laws, but to an additional tax every time they are sold at an exchange, board of trade, or other similar place. Some of them, therefore, will reach the consumer, if this is a tax on consumption, charged with only one tax, some with two, some with three, and so on, depending in each case upon the number of

times the article may have been sold at a particular kind of place or market. And as to all other articles of consumption, not subject to taxation under previous laws, each one of them must now reach the consumer burdened with a separate tax for each time it has been sold at one of the places described in the act; but if the article reaches the consumer without having at any time been sold at such a place, he is subject to no tax whatever. Is such an excise on consumption "uniform throughout the United States?" If a duty of fifty per cent. ad valorem were imposed on imported goods of a particular kind when consigned to a board of trade, or to a member of a board of trade, and a duty of only twenty-five per cent. ad valorem, or no duty at all, on all other goods of the same kind, would it be a uniform duty in the constitutional sense? We suppose it would be uniform in the geographical sense if taxpayers and their property are to be classified according to State lines, for it would be uniformly unequal in every State. In the case of excise taxation under the internal revenue laws, would it be constitutional to impose one rate upon tobacco, for instance, grown or manufactured at certain places, and a different rate upon the same article grown or manufactured elsewhere? In the case of *United States vs. Singer*, 82 U. S., 111, this Court said the excise was uniform because it was "assessed *equally* upon all manufacturers of spirits wherever they are." Undoubtedly the excise in question in that case was uniform, but unless we are correct in our contention here, it was not uniform for the reason given by the Court.

Even if this is a duty or excise on the privilege of being a member of an exchange, or board of trade, or other similar place, or on the privilege of transacting business at such places, that is, the privilege of enjoying the advantages and benefits which such places afford—it is not uniformly laid. All the members of such associations, those who buy and those who sell, possess equal privileges, but those

only are taxed who make sales of products or merchandise. The value of the privilege to buy at such places is as great as the value of the privilege to sell, and one is just as exclusive as the other; but neither the privilege to buy nor the actual use of that privilege is taxed under the act. The privilege to buy and sell bonds, stocks, bills of exchange and securities of all kinds is possessed and exercised by members of exchanges, boards of trade, and other similar places, to the same extent and in the same manner as the privilege to buy and sell products or merchandise, and it is fully as valuable; but it is not taxed. If the privilege is taxed at all, it must be taxed as a privilege, and, as such, it is an entire and undivisible thing. To divide it and subdivide it and classify its several parts, taxing those who use it for one purpose and not taxing those who use it for another purpose under exactly the same conditions, is certainly not a compliance with the rule of uniformity or equality as heretofore construed. Even, therefore, if such privileges are so different in their nature and use from the right to buy and sell at other places as to constitute a distinct class for the purposes of taxation, the act makes an unjust discrimination between persons and property of the same class, and this has always been condemned by the Courts. It make a discrimination between buyers and sellers of "products or merchandise" at the same place and under the same conditions, and it makes a discrimination between sellers at the same place and under the same conditions, the latter discrimination being based solely on the character of the commodities sold. These discriminations cannot be justified under the constitution upon the ground that it was the policy of the law to encourage and promote sales of bonds, stocks, &c., at exchanges, boards of trade and other similar places, and to discourage sales of products or merchandise at such places, for Congress cannot depart from the constitutional rule on any such ground. The rule prescribed is imperative and

must be obeyed, and when it is ascertained that it has not been complied with, no matter what may be the reason for its violation, the tax is invalid. In selecting the subjects for taxation, considerations of public policy are entitled to their proper influence, and particular kinds of property or privileges may be wholly exempt, but on the subjects selected for taxation the rates must be uniform according to the character of the things taxed; that is, things of the same kind must be taxed at the same rate. If a privilege is taxed, all who possess and use it at the same place and under the same conditions must be required to pay or the rule of uniformity is violated.

If this is not a tax on the sale or agreement to sell, as it purports to be, it is a stamp duty on documents, and as such is of course subject to the rule of uniformity, and what we have already said on that subject is as applicable to it as to the other subjects of taxation. We have endeavored to show that it is not a duty or excise on a privilege or an impost on consumption, and we do not think it will be contended that it is a duty on an occupation or business. Whether the tax or duty is imposed upon the document or upon something else, the question as to the power of Congress to require a party to a sale or agreement to sell personal property in the course of intra-state commerce to make a written note or memorandum of the contract, when the law of the State permits it to be made in parol, and to punish him by fine and imprisonment for a failure to do so, is directly involved in both of these cases; and if the duty is imposed on the document only, the Court must also decide whether or not Congress has the power, under the circumstances stated, or indeed under any circumstances, to require the party who makes a sale to make a written note or memorandum of the transaction solely for the purpose of imposing a tax on it; or, in other words, whether Congress can, in the exercise of the taxing power, or

any other power, compel a citizen to create a thing in order that it may be taxed by the United States.

The first clause of Schedule A which imposes stamp duties on bonds, debentures, certificates, &c., provides that "in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed"; but the law prescribes no penalty whatever for a failure or refusal to make the note or memorandum required by this clause. The penalty is imposed only for a failure to pay the duty by affixing a proper stamp. But in the next clause, which is the one applicable to these cases, there is a penalty of five hundred dollars, or imprisonment for six months, or both, imposed upon every one "*who in pursuance of such sale, agreement of sale, or agreement to sell, delivers any such products or merchandise, without a bill, memorandum, or other evidence thereof as herein required,*" and under this provision the appellant Nicol was prosecuted and convicted. The information upon which he was tried did not charge that he had delivered any products or merchandise without making and delivering a bill or memorandum, agreement or other evidence of the sale, but simply that he had *made a sale* at the Board of Trade "for immediate and present delivery," without making and delivering the required evidence of the transaction. The Court, however, held the information sufficient, and overruled a demurrer, a motion to quash and a motion to arrest the judgment. The information was clearly defective; it failed to charge any offense under the statute, but as this appeal is not prosecuted to reverse the judgment of conviction in the District Court, but for the purpose of reviewing the judgment of the Circuit Court refusing to discharge the prisoner on a writ of *habeas corpus*, we suppose the error indicated is not now material. The appellant has been convicted under an errone-

ous construction of the statute by the court in which he was tried, but if the statute itself is unconstitutional and void, the fact that it was erroneously construed cannot affect his right to relief in this proceeding.

The statute imposes a fine or imprisonment, or both, for consummating a sale of certain commodities made at any of the places specified, by delivering the things sold, without also making and delivering to the purchaser a bill, memorandum, or other evidence—that is, written evidence—of the transaction. It is the place where the sale is made, and not the place where the bill or memorandum is made, that determines whether or not the tax or duty shall be imposed, and this, we think, shows, as already argued, that it is the sale itself that is taxed, and that the other requirements are made in the statute merely to facilitate its collection.

That each State “has the right to regulate the transfer of property within its limits,” is a proposition which cannot be disputed. *Greene vs. Van Buskirk*, 72 U. S., 307; 74 U. S., 139; *Hervey vs. Rhode Island Locomotive Works*, 93 U. S., 664. Whether this is a part of its police power, or belongs to some other class of governmental powers, is immaterial, for its existence is conceded, and from its very nature it must be plenary and exclusive. It is inconceivable that two different sovereignties can possess equal power to regulate and control the same thing at the same time and place.

In the case of *New York vs. Milne*, 11 Pet., 102, this Court said that “a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restricted by the constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by

any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are *not* thus surrendered or restrained, and that, consequently, in relation to these the authority of the State is complete, unqualified and exclusive." And in the case of *Gibbons vs. Ogden*, 9 Wheat., 1, Chief Justice Marshall, speaking of inspection laws, said, "They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those with respect to turnpike roads, ferries, &c., are component parts of this mass. No general direct power over these subjects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislation of the Union can reach them, it must be for national purposes; it must be when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." - See also *License Cases*, 5 How., 504; *Passenger Cases*, 7 How., 283; *License Tax Cases*, 5 Wall., 470; *Lane County vs. Oregon*, 7 Wall., 71; *Texas vs. White*, 7 Wall., 564; *Lehigh Valley Railroad Co. vs. Pennsylvania*, 145 U. S., 192; *Louisville N. R. & T. R. Co. vs. Mississippi*, 133 U. S., 587; *Budd vs. New York*, 143 U. S., 517; *Brass vs. North Dakota*, 153 U. S., 391; *Postal Teleg. Cable Co. vs. Charleston*, 153 U. S., 692.

We cite these decisions not because authority or argument is now necessary to prove that the States

possess the exclusive power to regulate their own internal commerce by prescribing the manner and form in which contracts respecting that commerce shall be made, within their own limits, in order to transfer the title, but because in these well considered cases this Court has carefully defined the lines which separate the authority of the general government from the authority of the States over the subject of commerce generally. They firmly establish the principle that Congress cannot interfere in any manner, directly or indirectly, with the purely internal or domestic commerce of the States, unless it be necessary and proper to do so in order to effectively execute some power expressly delegated to that body by the constitution of the United States. It cannot wantonly and unnecessarily invade the domain of State legislation and prescribe rules and regulations in conflict with the rules and regulations prescribed by the State. This power belonged to the States primarily, and they have never parted with it except so far as its exclusive exercise by them in a particular case might prevent or obstruct the full exercise of some paramount authority conferred by the constitution upon the government of the United States.

We think associate counsel has conclusively shown that the clause of the statute under which the appellant was convicted, does interfere with and regulate, as far as it goes, the internal commerce of the States, and we do not propose to dwell on that part of the argument. It is plain that the assertion of a power in Congress to impose penalties upon a citizen for a failure or refusal to make a written contract or memorandum on the sale of personal property within a State, is founded upon the assumption that it has the power to require such a contract or memorandum to be made, and to declare the sale void if not so made. It is true that the act in question does not in terms declare an oral contract of sale void, but it makes it unlawful and

punishes the party for making it, or, to speak more correctly, it punishes him for delivering the property on a parol contract, which is the same thing, for the delivery is a necessary part of the sale. If this has been done in the exercise of a power conferred by the constitution of the United States, we do not see how any Court, State or Federal, could, without disregarding the well established rules of law, enforce a parol contract for the sale of products or merchandise at an exchange, board of trade or other similar place. If, on the other hand, the contract would not be legally void, still the act interferes with and obstructs the internal commerce of the States in the same manner and to the same extent that the legislation of various States interfered with and obstructed interstate commerce in numerous cases heretofore decided by this Court. It is a restraint upon that commerce; it requires something to be done in carrying it on which the law of the State does not require; and it not only requires this, but it imposes a punishment by fine and imprisonment upon the citizen engaged in that commerce for conducting it in strict accordance with the laws of the State where his business is transacted. It is scarcely necessary to suggest that, if this can be constitutionally done, Congress can, whenever it may consider it necessary and proper to do so in order to effectually execute its taxing power, or any other power expressly delegated, prescribe the form in which all contracts shall be made, and the manner in which all trade shall be conducted within the limits of every State. If the power exists to the extent claimed in these cases, we are unable to see where the limitations upon it are to be found. Congress can adopt any mode of collection it chooses, provided it does not violate some fundamental right of the citizen secured by the constitution, or infringe some exclusive right of a State, and if, when a particular mode has been adopted, every means which, in its judgment,

would facilitate the collection may also be adopted, there is plainly an end of all limitations upon the power of Congress to control the internal commerce of the States and the private property and domestic affairs of their people. According to this theory whatever is taxable in a State is controlable by Congressional legislation, even though such legislation may be inconsistent with the exercise of authority over the same subject which unquestionably belongs primarily to the State under our system of government. We do not question the proposition, that where a power has been conferred upon Congress either by express delegation or by fair implication from a power expressly delegated, it is paramount to the authority of the States over the subject to which the power relates; but the power delegated must itself relate to that subject. The implied or incidental power cannot be so extended as to embrace subjects of legislation to which the principal or expressly delegated power does not relate, and this rule of interpretation is especially applicable in a case where it is sought to use the implied or incidental power for the purpose of regulating or controlling a matter which, according to the theory and structure of the government, has been left to the control of the several States. A power not delegated is a power prohibited, and this would have been the true rule of construction even without the tenth amendment. Certainly the power to regulate the internal commerce of the States by prescribing the forms in which contracts for the sales of property within their limits shall be made, or otherwise, has been neither delegated to the United States nor prohibited to the States, and it is therefore expressly reserved to the States. But that reservation is subject to the general qualification resulting from the relations which the States bear to the government of the United States, that Congress may pass such laws as shall be necessary and proper for carrying into execution the powers delegated to it, and in doing so, may, to a certain extent, incidentally interfere with the internal com-

merce of the States. The question then is, whether Congress in the exercise of the power to lay and collect taxes, duties, imposts and excises, can regulate or control the internal commerce of the States, and if so, to what extent can it do so?

The power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, and the power to regulate the internal commerce of the States, are distinct powers, and the subjects to which they relate are distinct subjects. The power over one of these subjects is granted to Congress, and the power over the other is reserved to the States respectively. The power to lay and collect taxes, duties, imposts and excises is a distinct and substantive power, conferred for certain designated purposes—that is, to pay the debts and provide for the common defense and general welfare of the United States—and it has no connection with the power to regulate commerce in the States or elsewhere. In the language of Mr. Chief Justice Marshall, the power to regulate commerce, is “a great, substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” *McCullock vs. Maryland*, 4 Wheat., 316. He was speaking of the power to regulate interstate and foreign commerce, but the power to regulate the internal commerce of the States is of the same nature, the only difference being that one belongs to the several States while the other belongs to the general Government. It is as exclusive in the one as it is in the other unless it shall become necessary and proper to interfere with it in the States, as an appropriate and plainly adapted means for the execution of some special power granted to Congress; and the implied or incidental power employed for this purpose must be plainly applicable to the particular granted power in connection with which it is exercised. The power to impose and collect taxes, duties, &c., is granted; but, does this carry with it the power

to require written memoranda to be made of sales and transfers of property within the limits of a State and to punish the seller by fine and imprisonment for not doing so, when the sale and transfer have no connection with interstate commerce? Can Congress determine finally and conclusively that the exercise of such a power is necessary and proper in a given case, and if so, can it also determine finally and conclusively the degree of necessity and propriety required to justify its exercise and the extent to which it shall be employed? If these questions are answered in the affirmative, we do not see that the constitution has left any line of demarcation between the reserved powers of the States and the granted powers of Congress, or any beneficial limitations upon the authority of that body to legislate upon all subjects affecting the trade and industry of the country. The object of the statute under consideration was to impose and collect certain taxes, duties, &c., and we admit that it was competent for Congress to provide for the use of all the usual and customary means for the accomplishment of that purpose, but the means employed must not only be plainly adapted to the end, but they must be consistent with all parts of the constitution and with the whole spirit of our political institutions.

It could not authorize the confiscation of the citizen's property or the imprisonment of his person without a judicial proceeding, or prohibit him from carrying on a lawful business within the limits of a State upon the ground that it would diminish the revenue to be derived from other sources, or that it would make the collection of the revenue more difficult; nor can it employ means in conflict with the constitutional authority of the State with any more propriety, or to any greater extent, than it can employ means in conflict with the constitutional rights of the citizen

In the late statute Congress has not seen fit to

confine itself to the usual means of securing the payment of the tax or duty, but has attempted to stretch its power beyond the limits heretofore assigned to it by any judicial authority, as far as we know. All that was necessary and proper to do, was to provide for the seizure of the thing sold if the tax was not paid, or, at the most, to provide for the imposition of a fine and imprisonment for a failure or refusal to pay the tax. Even the latter provision is unusual, but it is contained in the law, and the petitioner, Nichols, has been convicted under it. It is true that the punishment is imposed for a refusal to affix the stamp with intent to evade the provisions of the act, but we suppose that every one who refuses to pay a tax does so, legally speaking, with intent to evade the provisions of the law imposing it, and consequently the substance of the transaction is, that the petitioner has been fined and imprisoned for not paying the tax. But in the other case Congress has considered it "necessary and proper" to provide for the infliction of a fine and imprisonment for a failure or refusal to make a bill or memorandum of the sale or agreement, with intent to evade the provisions of the act, and to prohibit the delivery of the property sold until such bill or memorandum is also made and delivered.

We suppose that a party who has been fined and imprisoned under these unusual penal provisions has a right to ask a court to inquire whether they are necessary and proper provisions in a United States tax law, notwithstanding the fact that Congress has adjudged them to be so in this particular instance, but in no other, and therefore we propose to state briefly the grounds upon which it is claimed that they must be held invalid. Assuming that the tax or duty is not imposed on the document itself, the sole object of the provisions referred to must be to secure the payment of the tax or duty on the sale or agreement, or on the privilege, occupation or business, or on the

consumption of the product sold, and in all these cases it is evident that the making of a bill or memorandum prior to or at the time of the delivery of the goods sold, and the delivery of the bill or memorandum to *the buyer* of the goods, cannot be as effective in securing the payment of the tax or duty as a written report of the transaction to the official authorities with the requirement that the payment should be made in money or by affixing a stamp to the report. Of what value, as a means of securing payment, is a bill or memorandum delivered by the seller to the producer? It is not required to be preserved, or recorded or reported to any revenue officer or other government official, and consequently the only practical effect of the requirement is to obstruct commerce within the State by punishing the seller for delivering the thing sold without also at the same time delivering a bill or memorandum of the transaction. If a written report, under oath, had been required with a stamp affixed to it denoting the amount of the tax or duty, or if payment in money had been required based upon the amounts of the transactions as shown by the report, the security of the government would have been greater, and the internal commerce of the States would not have been interfered with in the least degree. The sales and agreements would have been freely made and consummated by the delivery of the property, and there would have been less uncertainty concerning the collection of the tax or duty than there is under the method adopted. We concede that where Congress has a choice among means, all of which are clearly constitutional, it may adopt any one it prefers, and the courts will not attempt to control its action; but when, as in this case, the means adopted interfere with rights previously existing in the States and among their people, and are, therefore, of doubtful constitutionality at least, and there are other means entirely free from constitutional objections, and equally or more effective for

the accomplishment of the same purpose, it is the duty of the courts to interfere for the protection of the States and their citizens. In such a case there is no question as to the degree of the necessity or propriety upon which the validity of congressional legislation depends, because, in fact, there is no necessity or propriety whatever in adopting the one questionable means and rejecting the others. In the present statute we have a very suggestive illustration of the consequences that would follow an unqualified recognition of the rule that Congress must determine finally and conclusively what legislation is necessary and proper in the execution of its powers. We have already, in another connection, called attention to the clause of the statute which immediately precedes the one under consideration, and which imposes stamp duties on bonds, debentures, certificates, &c., and requires that in certain cases a bill or memorandum shall be made, but does not provide for any punishment for a failure or refusal to make it, or for delivering the thing sold without making it. It appears, therefore, that Congress has in the same statute decided the same question in two different ways. In the case of bonds, debentures, &c., it has decided that it was not necessary and proper to compel the seller to deliver a bill or memorandum before or at the time of delivering the thing sold in order to secure the payment of tax, and in the case of products or merchandise, it has decided that it was necessary and proper to do so, although the opportunities for evading the payment of the tax or duty on the sales and transfers of bonds, certificates, &c., which are easily concealed and pass by delivery from hand to hand, are immeasurably greater than in the case of sales of products or merchandise. Undoubtedly if Congress possessed the power in one case, it possessed it in both, and the fact that it was employed in one and not in the other shows what unjust and oppressive discriminations may be made between different classes

of property and occupations, if that body is to have not only the right to determine when and how it will use its powers, but also the exclusive right to determine the extent of its powers. The man who sells bonds, certificates, &c., at an exchange or other similar place in Chicago, cannot be fined or imprisoned for failing to make a bill or memorandum, although the law requires him to do so; but the man who sells produce or merchandise at the same place and in the same way can be—and has been—fined and imprisoned for a failure to comply with the same requirement.

If this is a tax on the document, the provision requiring a bill or memorandum to be made, and imposing a punishment for a failure to make it, is none the less a regulation of the internal commerce of the State, and it is subject to all the objections we have urged against it on that ground; and it is subject to the additional objection that it is an attempt by Congress to compel the people to create a thing merely for the purpose of taxing it. In the License Cases, this Court decided that the power of taxation reaches only existing things and that Congress could not authorize a trade or business within a State in order to tax it; and in *United States vs. DeWitt*, 75 U. S., 41, it decided in effect that Congress had no power to prohibit the manufacture or sale of a particular article within the limits of a State in order to increase the manufacture or sale of another article of the same general character from which revenue was obtained by taxation. We suppose it will be conceded that if Congress actually possesses the power under the constitution of the United States to prohibit or to require a thing to be done within the limits of a State, the fact that it would interfere with the exercise of the police power of the State is of no consequence whatever, for if the power of Congress over the subject is conferred by the constitution it is supreme over all the powers of the State—the police power as well as others. If the

power to tax necessarily and properly includes the power to compel the people to create things to be taxed, it makes no difference whether such legislation interferes with the police powers of the States or with their power to prescribe the forms of contracts and regulate trade and commerce within their own limits. The laws of the State of Illinois allow contracts for the sale of personal property in the State to be made in parole, but Congress has declared in the act under consideration that if they are made in parole and the property sold is delivered to the purchaser without also delivering a writing, the form of which is prescribed in the statute, the citizen shall be fined or imprisoned, or both; and this is done, if the tax is on the document, solely for the purpose of creating something to tax. This is certainly extending the power of taxation, which was already sufficiently ample for all emergencies, far beyond its legitimate scope and we cannot believe it will be sanctioned by the Court. It has often been judicially declared that the power to tax is the power to destroy, but the Court is now asked to declare, for the first time, that it is also a power to create.

In *Weston vs. The City Council of Charleston*, 2 Pet., 449, the Court said: "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits"; and in many other cases the unlimited extent of this power, whether it is vested in the general government or in the States, has been recognized. In view of these decisions, it is not going too far to say that if the clause of the statute under which these parties have been convicted is constitutional, it is clearly within the power of Congress, by the use of its taxing power, to destroy any trade or industry in the country against which a temporary popular clamor may be raised, however useful or necessary such trade or industry may be, or however solicitous the State in which it is carried on may be to foster and promote

it. In the present case the discriminating tax or duty imposed upon products or merchandise, or upon their sale at particular places, is sufficient in a great many instances to determine the question of profit or loss on the transaction. Competition is so severe, and the margin of profit in legitimate trade is so small that a fractional percentage upon the price of an article often turns the scale one way or the other, and consequently a discrimination in taxation which, in other times, might have been too insignificant in its effects to justify the condemnation of the act making it, will now destroy the value of the property or business against which the discrimination is directed. Whatever is of common knowledge is judicially known to the Court, and, therefore, it was not necessary to introduce evidence on the trials to prove the injurious effects of this statute upon methods of doing business which the State of Illinois and many other States have expressly recognized and encouraged by their laws and public policy.

We respectfully ask a reversal in both cases.

J. G. CARLISLE

For Appellant and Petitioner.

HENRY S. ROBBINS,

Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

JAMES NICOL, APPELLANT,	}	No. 435.
<i>v.</i>		
JOHN AMES, UNITED STATES MARSHAL for the northern district of Illinois.		

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.**

No. 4, Original.

**EX PARTE: IN THE MATTER OF GEORGE R. NICHOLS, PETITIONER,
FOR A WRIT OF HABEAS CORPUS.**

BRIEF FOR THE UNITED STATES MARSHAL.

STATEMENT.

QUESTION.

The question raised is the constitutionality of that provision of the act of June 13, 1898 (30 Stat., 448),

known as the "War Revenue Act," which levies a tax "upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery."

In the Nicol case (No. 435), the validity of the requirement that on every sale, or agreement of sale, or agreement to sell, there shall be made and delivered by the seller to the buyer a memorandum thereof, is attacked.

In the Nichols Case (No. 4, Original) the constitutionality of the provision requiring a stamp to be affixed to such memorandum is impugned.

THE LAW.

The following are the material parts of the act, the italics being mine:

ADHESIVE STAMPS.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, *there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.*

. SCHEDULE A.

STAMP TAXES.

[Second paragraph.] *Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: Provided, That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not*

less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

THE CASES.

James Nicol, the appellant in No. 435, is and was a citizen of Illinois, and a member of the incorporated commercial exchange known as the Board of Trade of the City of Chicago. On September 2, 1898, in the course of his business on this Board of Trade, Mr. Nicol, by oral contract, sold, for immediate delivery at the city of Chicago, to one James H. Milne, also a citizen of Illinois and a member of the Chicago Board of Trade, two carloads of oats, being 2,289 bushels, then in Chicago, at the price of 20 $\frac{3}{4}$ cents per bushel, and for the total sum of \$474.98. He sold the oats on the exchange without making and delivering to the buyer any memorandum of the transaction, as required by the War-Revenue Act. For this violation of law an information was filed against him by the United States attorney for the northern district of Illinois, and after trial he was convicted and fined the sum of \$500. He refused to pay the fine and, being taken in custody by the marshal, applied to the United States circuit court for a writ of habeas corpus, insisting that the law under which he was convicted and sentenced is unconstitutional. The circuit court held the law constitutional and discharged the writ. (See opinion *Shewalter*, D. J., record, p. 20.) From this judgment an appeal was taken to this court.

George R. Nichols, the petitioner in No. 4, Original, is and was also a citizen of Illinois, and a member of the

Board of Trade of Chicago. On October 4, 1898, in the course of his business upon that Board of Trade, he sold for immediate delivery at Chicago to Robert W. Roloson, also a citizen of Illinois and a member of the Board of Trade of Chicago, 10 tierces of hams, weighing 3,000 pounds, at $6\frac{1}{2}$ cents per pound, for the total sum of \$195, without affixing to the written memorandum thereof delivered by him to the buyer any revenue stamp. For this an information was filed against him in the United States circuit court and he was tried, convicted, and fined in the sum of \$500. Refusing to pay the fine, he was taken in custody by the marshal. To secure his release, he applied to this court for a writ of habeas corpus, insisting that the provision of the War-Revenue Act of 1898, requiring a stamp to be affixed to every memorandum of a sale at a board of trade, is unconstitutional.

ARGUMENT.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

"Every possible presumption," said Mr. Chief Justice Waite, speaking for the court in the *Sinking Fund Cases* (99 U. S., 700, 718), "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the Government can not encroach on the domain of another without danger. The strength of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Powell v. Penna.* (127 U. S., 678, 684) the court, speaking by Mr. Justice Harlan, quotes this language with approval, and cites also *Fletcher v. Peck* (6 Cranch, 87, 128); *Dartmouth College v. Woodward* (4 Wheat., 518, 625); *Livingston v. Darlington* (101 U. S., 407).

II.

The Constitution expressly confers upon Congress the taxing power.

The power which Congress exercised in levying the tax now before the court is found in section 8, of Article I, of the Constitution, which reads:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Aside from the requirement of uniformity as to duties, imposts and excises, the only limitations on the power of taxation contained in the Constitution are found in the fourth and fifth clauses of section 9, of Article I, which read:

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

III.

Congress may make all laws which shall be necessary and proper for carrying into execution the foregoing power.

Under the last clause of section 8 of Article I of the Constitution, Congress is given power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. Thus Congress has power to do whatever is necessary, or seems to it necessary, to carry into effect an express power.

In the great case of *McCulloch v. Maryland* (4 Wheaton, 316, 421) Mr. Chief Justice Marshall laid down the rule, which has been followed ever since:

The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.*

IV.

The selection of the means rests with Congress. Unless these means are forbidden by the Constitution, the courts will not interfere.

In the case of *McCulloch v. Maryland*, already cited, Mr. Chief Justice Marshall said (p. 423):

Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the

Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

This language was quoted with approval by Mr. Justice Gray, speaking for the court in the recent case of *Fong Yue Ting v. U. S.* (149 U. S., 698, 712), and also by Mr. Justice Harlan, who delivered the opinion of the court in the later case of the *Interstate Commerce Commission v. Brimson* (154 U. S., 447, 472), with the following additional language (p. 473):

It is a settled principle of constitutional law that "the Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." (4 Wheat., 316, 409.) The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It can not go beyond that inquiry without entrenching upon the domain of another department of the Government. That it may not do with safety to our institutions. (*Sinking Fund Cases*, 99 U. S., 700, 718.)

V.

With the exception and under the limitations of the Constitution, the taxing power reaches every subject of taxation.

The power to tax is an essential attribute of sovereignty. Without revenue, no government can exist. Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress. The breadth of the taxing power under our Constitution is well described by Mr. Chief Justice Chase, speaking for the court, in the *License Tax Cases* (5 Wall., 462, 471):

The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

And again by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Co. v. Soule*, 7 Wall., 433, page 443:

Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

Speaking of the character and extent of the power of taxation in the States, this court, Mr. Justice Field delivering the opinion, said in the case of the *State Tax on Foreign-held Bonds* (15 Wall., 300, 319):

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

VI.

In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of Government.

Within the limits fixed by the Constitution, Congress may use its discretion in selecting the subjects of taxation and distributing the burdens of Government. The

greater part of legislation is special; that is, Congress, in dealing with matters before it, exercises the right of classification. The decisions of this court recognize in the fullest and clearest way the right to classify.

In the recent case of *Magoun v. Illinois Trust and Savings Bank* (170 U. S., 283), where the inheritance-tax law of Illinois was assailed on the ground that there was an arbitrary and unconstitutional classification, Mr. Justice McKenna, speaking for the court, discusses elaborately the decisions upon the subject of classification, reaching the conclusion that the provision of the Illinois law levying a graded tax upon inheritances, and for that purpose dividing them into classes according to the value thereof, was not unconstitutional. He concludes with this language (bottom p. 300):

That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws

and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned.

(See Appendix for other decisions.)

VII.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

In determining whether a taxing law is constitutional or not, it is first necessary to ascertain its operation and effect in the light of the entire act. The form of the act is not the essential thing. In construing a tax law, the court will keep in view the reason of the law, and give the law a construction which will comport with the intention of the enacting power.

Thus, in the *License Tax Cases* (5 Wall., 462), it was conceded that Congress could not grant a license to traffic in liquor within the States, because such authority is vested in the States; yet the Federal law in words provided for the issuance of a license, and made it a misdemeanor to engage in the liquor business without first paying the special tax and obtaining a license. This court upheld the law upon the ground that though the statute called it a license, it was in effect and operation a tax, which Congress had the right to levy upon the liquor business.

VIII.

The tax is upon the sale, agreement of sale, or agreement to sell, not upon the memorandum thereof.

The sixth section of the act provides that the tax shall be levied and collected:

For and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act.

The subject-matters of taxation are not only bonds, etc., and other documents and instruments, but also "matters and things" described in Schedule A. "Matters and things." More comprehensive words could not be used. The tax shall be levied and collected either for and in respect of the subject-matters above mentioned,

Or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed, etc.

So the tax is to be levied, according to this section, either "for and in respect of" the matters or things described in Schedule A, or "for or in respect of" the paper upon which they shall be written; that is, the tax shall be levied either upon the transaction or the written memorandum of it. To ascertain upon which, we must turn to Schedule A, which describes the thing taxed. By the express provisions of Schedule A the tax is levied:

Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange,

or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent.

The tax, therefore, by the express provisions of Schedule A, is levied upon "each sale, agreement of sale, or agreement to sell." The amount of the tax is regulated by the value of the sale or agreement to sell. The concluding portion of the paragraph of Schedule A relating to this tax simply provides the means for collecting it. It reads:

That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the *amount of the tax on such sale*.

What follows is a description of the memorandum required and a penalty for making a sale without a memorandum, or delivering a memorandum without the proper stamps affixed. The words which I have italicized in the proviso, "*the amount of the tax on such sale*," show conclusively the intention of Congress that the tax should be levied on the sale, and not on the memorandum. The memorandum is required for the same reason that Congress requires tobacco to be packed in a certain form, or liquor to be put up in specified packages—for the purpose of making easy the collection of the tax through the purchase and affixing of stamps.

It is suggested that this can not be treated as a tax on sales, because, under the holding in *Cook v. Penna.* (97 U. S., 566), a tax on sales would in reality be a tax on the goods sold; and this can not be a tax upon the goods sold because it applies also to agreements to sell for future delivery, in which no goods pass. Without conceding that *Cook v. Penna.* holds that in every case a tax on sales is to be held a tax on the commodity sold, I submit that the argument of opposing counsel is really one in favor of the Government's contention. The tax is a tax upon the act of transfer, and not upon the merchandise, because it applies not only to actual sales where merchandise passes, but to sales for future delivery where no merchandise passes. The tax, therefore, is upon the transaction, the contract, or agreement.

IX.

Only those sales, agreements of sale, or agreements to sell, are taxed which are made on a commercial exchange. Such sales are made under conditions which distinguish them from other sales, thus affording a ground for classification. The enormous value of the sales made on exchanges and the facilities there enjoyed in making them, explain the imposition of the tax.

(1) The sales and agreements of sale, and agreements to sell, which are classified for taxation by this act, are those made "at any exchange, or board of trade, or other similar place, either for present or future delivery." The fact of being made at an exchange is sufficient to distinguish them, to set them apart, to segregate them from sales generally. It will not be claimed that there

is or can be any difficulty in identifying these sales and contracts for sales. Surely they are thus far distinguished. But it is averred in the petitions that these sales and contracts for sale made on the Chicago Board of Trade are identical in their character with all other sales and contracts for sales of the same kind of merchandise made in the city of Chicago and elsewhere throughout the United States at other places than on such exchanges, boards of trade, or other similar places. It may be conceded that in a sense the sales and contracts for sales made on an exchange are identical with sales and contracts for sale made elsewhere. But sales made elsewhere are not sales made on an exchange. The parties to the transaction, the seller and buyer, are not subject to the rules which govern commercial exchanges. They do not enjoy the facilities or privileges for trading that a commercial exchange affords. The safeguards thrown by exchanges about the transactions of its members are not present. So you can not say that sales and contracts made outside of an exchange are identical in character with those made on an exchange. In point of fact, the object of creating exchanges is to promote the transaction of business among its members. They enjoy facilities and are afforded a protection in their dealings with one another which outside parties lack. The privileges which come to them through membership are valuable, sometimes exceedingly so. It is unnecessary to particularize. The court will take judicial notice of what a commercial exchange is. In the recent cases of *Anderson et al. v. United States* (171 U. S., 604) and *Hopkins et al. v. United States* (171 U. S., 578) the

character of an exchange was elaborately discussed before the court. In the Hopkins Case the court considers carefully the character of the Kansas City Live Stock Exchange, which the Government sought to have dissolved as being a combination in restraint of trade in violation of the Anti-Trust Law.

Said the court, speaking by Mr. Justice Peckham, page 587 :

As set forth in the record, the main facts are that the defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; *to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction of the business itself.* The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom.

In general terms, this language applies to the Chicago Board of Trade, except that its members are not limited to dealing in live stock. They buy and sell flour, wheat, corn, pork, meats, and other food products. Later, the

following language is used with reference to the facilities afforded by the exchange, page 596 :

The facilities or privileges offered by the defendants are apparent and valuable. The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective.

After describing the facilities afforded by the Kansas City Live Stock Exchange, and showing that charges for such facilities do not amount to a burden upon interstate commerce, the court says that "the services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature" (p. 597). The New York Stock Exchange, the New York Produce Exchange, and the New Orleans Cotton Exchange are taken as illustrations.

The Chicago Board of Trade is a corporation, organized by a special charter, which appears in the Record, No. 435, page 6. For convenience I print this charter as an appendix to my brief. The court will observe that the corporation is authorized to establish such rules, regulations, and by-laws for the management of their business and the mode in which it shall be transacted as they may think proper (section 4). The corporation shall have the right to admit or expel such persons as they may see fit (section 6). The corporation may appoint committees of reference and arbitration and

committees of appeal for the settlement of such matters of difference as may be voluntarily submitted for arbitration by its members. The acting chairman of such a committee is given power to administer oaths and compel the attendance of witnesses (section 7). The award of such a committee may be filed with the clerk of the circuit court and thereupon has the force and effect of a judgment (section 8). The corporation is given power to appoint inspectors to inspect and measure the produce dealt in by the members (section 10).

The Chicago Board of Trade was organized in 1848 and incorporated in 1859. It owns a building which cost \$1,800,000. It has about 1,900 members and the initiation fee is \$10,000 (Clapp, 301). Its rules and regulations are set out in an appendix to Bisbee & Simonds on Produce Exchanges, pages 303-358. * * *

The Chicago Board of Trade is governed by a board of directors (Bisbee & Simonds, pp. 303, 306), which has power to suspend or expel a member for failing to comply promptly with the terms of any business contract or obligation, or with an award of the arbitration committee; for improper conduct of a personal character in the rooms of the association; for willfully violating any business contract or obligation; for violating any of the rules, regulations, and by-laws of the exchange; for making or reporting any false or fictitious purchases, and for any other dishonorable or dishonest conduct.

Rumors or other information of a grave offense against the good name and dignity of the exchange are required to be promptly investigated, and, if well founded, steps taken to prosecute the offending member. (B. & S., section 15, pp. 310, 311.)

In all hearings before the arbitration committee, the rules are to be construed "as being designed to secure justice and equity in trade." (p. 319.)

Membership is at the will of the board of directors. Visitors are not permitted to negotiate or transact any business in the exchange rooms. (B. & S., p. 323.)

By sections 3 and 4, Rule XV, the "established minimum rates of commission governing members of the association" are prescribed (325, 328). "No rebate, drawback, division of commissions, or any other allowance, directly or indirectly, shall be permitted or excused (328). No member is permitted to do business for a nonmember on a salary" (328). "Any violation or evasion of this rule shall be deemed and held to be an act of bad faith and conduct of so dishonorable a character as to render a member guilty thereof to the severest discipline authorized by the rules of the board of trade" (328). For the first offense the punishment is suspension or expulsion, and for the second the board of directors must expel him." "The name of the party so convicted shall be posted on the bulletin of the exchange" (329). A reward of \$500 may be paid for proof of such violation (329).

Rule XX fixes the places and hours for trading, "it being the object and intent of this rule that all such trading which may tend to the maintenance of a public market" shall be thus confined (331).

The regulations for trading are framed in great detail (332-352).

These rules have been many times before the courts of Illinois, Federal and State, and there is no hint or suggestion of their illegality in any of the cases.

In *Roundtree v. Smith*, 108 U. S., 269 (1883), the plaintiffs were awarded a judgment for the commis-

sions prescribed by these rules. So, too, in many other cases, the latest being *Hansen v. Boyd* (161 U. S., 397). In *Nelson v. Board of Trade* (58 Ill., App., 399, 412) the right of this body to prescribe regulations concerning warehouse receipts to be recognized by its members, being the same in principle as the admission of securities by stock exchanges, was recognized. [From Mr. Kranthoff's brief in the Hopkins Case, p. 157.]

(2) I think it sufficiently appears from what I have said that the seller on an exchange enjoys facilities or privileges which the outsider does not. It is in view of these privileges, if not because of them, that this tax is levied. It is on the sale or agreement to sell under special or exceptional conditions that the charge is imposed. The tax is not a tax upon the memorandum, or upon the commodity sold, or upon the occupation of selling; it is not a tax upon the sale or agreement to sell apart from the privilege enjoyed in making the sale on an exchange, but it is upon the sale as made, on an exchange, under the conditions and with the privileges inseparably connected with such sale. The conditions which attach to a sale made on an exchange, the privileges by virtue of which the contract has been consummated, become a part of the transaction and serve to distinguish it and justify the imposition. The contract or agreement which is taxed has become more valuable because it was made on an exchange. The commercial advantages offered by the exchange, the safeguards thrown by the exchange around the transaction, the security which the supervision of the exchange gives that the terms of the agreement will be complied with—all these make the agree-

ment to purchase more valuable than it otherwise would be. The exchange exacts good faith and honorable dealing from its members. The fact of membership is in itself security that the terms of any agreement made by a member on the board will be carried out.

The court will observe that the tax is graduated according to the value of the sale or agreement of sale or agreement to sell. The agreed price controls. The security back of the promise to pay by the buyer is therefore a matter of moment to the seller. He can afford to pay something, not only because of the better market the exchange offers, but because of the guaranty it affords that the price obtained in that market will be paid.

It is insisted that this tax can not be treated as a privilege tax, because the seller on an exchange enjoys no privilege conferred by the Government. The Government gives nothing in the way of a privilege, and therefore can charge nothing in the way of a tax. Certainly this tax can not be regarded as a tax for a privilege conferred by the United States. It is not a privilege tax in that sense. But while not a tax *for* a privilege, it may be regarded as a tax *on* a privilege. A tax may be laid upon a privileged class, not because the Government conferred the privileges, but because it recognizes their existence. In selecting subjects for taxation Congress recognizes existing conditions. A class separated from the rest of the community through the enjoyment of lucrative privileges, from whatever source received, may be selected by Congress for special taxation, not because Congress conferred the privileges, but because through having them

such persons are better able to stand the tax. It is in this way that an equality of burdens is maintained. The changing conditions in business and in society, through continual commercial development, are constantly creating new classes which Congress makes use of in equalizing the burdens of government. This war-revenue act is full of illustrations of this truth.

For instance, the second section imposes certain special taxes. It imposes taxes on bankers, not simply on national banks, which receive certain privileges and franchises from the United States, but on State banks and private banks. The banks are recognized as an existing class, enjoying certain privileges, and therefore able to pay a contribution to the Government.

Paragraph 2 taxes stock brokers; paragraph 3, bond brokers; paragraph 4, commercial brokers; paragraph 5, custom-house brokers. These are occupation taxes, not levied because the Government has a right to regulate these different classes of brokers, but because the business that they are engaged in justifies the exaction of a special contribution.

Paragraph 6 levies a tax on proprietors of theaters, museums, and concert halls; not on all proprietors of such places of amusement, but only upon those in cities having more than 25,000 population. The locality here controls the tax. And yet the tax is uniform, because in all cities having such population the proprietors of such places of amusement must pay the tax. A class is created and the tax is uniform within the class. The Government has no right to regulate theaters, museums, and concert halls, in cities situated in the States. Their

control comes within the police power of the States as exercised usually by the municipalities. Such places, or the proprietors of them, are usually required by the cities to pay a license tax, and this is sustained, partly, at least, by the power to regulate them. Congress, which has no power to regulate them, taxes them simply because it regards them as proper and existing subjects of taxation.

(3) Congress, in this same act, levies an inheritance or succession tax. Such a tax when levied by a State is usually treated as a tax on the privilege of succession, which may be regulated by the State, and therefore enjoyed under such conditions as the State may see fit to impose. (*Mayoun v. Trust and Savings' Bank*, 170 U. S., 283, 288.) The United States does not assume to regulate the descent of property. Its tax can not be sustained, therefore, as the price for a privilege enjoyed at its hands; yet it taxes, and has a right to tax, the privileges thus enjoyed. Though received from the State, it is enjoyed under the protection of the United States, as well as that of the State. The maintenance of the National Government is essential to the preservation of the States, and the protection of the rights of person and property enjoyed by the citizens of the States, who are also citizens of the United States. The members of the Chicago Board of Trade do business in the United States, although they are residents of Chicago. They are protected by the laws of the United States, although they are citizens of Illinois, and the necessity of such protection was never better illustrated than during the great

strike of 1893. Congress taxes the people of the States because the General Government is one formed by the people of the United States, and pledged to provide for their common defense and general welfare. The people, their property, their occupations, their business, their transactions, and acts may all be taxed, because they all exist under the protection of the General Government and receive the benefits flowing from it.

(4) Another thing. The magnitude of the business taxed, the probable profits involved, the amount a trifling imposition will yield when applied to numerous transactions, and the ease with which the tax can be collected, all are things to be considered in selecting and classifying subjects for taxation.

In the present case, sales and agreements to sell on exchanges, whether for present or future delivery, are taxed in part because of the enormous number of such transactions and the magnitude of the sums involved. A sale must be of the value of \$100 to be taxed at all, and the tax is only 1 per cent for each \$100 in value. Looked at in proportion to the value of the sale, the tax is only one-one hundredth of 1 per cent, an insignificant exaction, yet calculated to yield a considerable revenue in view of the enormous value of all the transactions on such exchanges.

The tax is uniform, because every sale, agreement of sale, or agreement to sell, made at an exchange, is taxed alike. All persons similarly situated are treated the same way and subjected to an equal burden. The tax operates with the same force and effect in every place in the United States where the subject of it is found.

It is contended that this tax must be uniform throughout the United States. I concede this is true. But the uniformity required by the Constitution is a uniformity within the created class. There is such uniformity here. The thing taxed is sales on exchanges. Wherever in the United States there is a sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place, the tax applies. And in such case, the tax applies by a uniform rule, according to the value of the sale, or agreement of sale, or agreement to sell. It is not necessary, in order to insure uniformity in the taxation of sales on exchanges, that every sale shall be taxed, whether made on an exchange or not. The subject-matter of the tax is sales on exchanges, not sales. If every sale on an exchange is taxed by the same rule, there is a uniform tax within the meaning of the Constitution.

This act, in another paragraph in Schedule A, under the heading "Express and freight," contains a provision that every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, which accepts goods for transportation, shall issue to the shipper a bill of lading or

manifest, or evidence of receipt for each shipment; and that a revenue stamp shall be attached to this document and canceled.

Here is a provision evidently designed to apply to the great transportation lines of the country. But in each city and town there are local draymen and expressmen who furnish certain transportation facilities. Because the great common carriers are required to issue bills of lading, to which a stamp must be affixed, it does not follow, in order to give the law a uniform operation, that every man who owns a dray or runs an express wagon must issue a bill of lading or manifest for every trunk or package he hauls. It is not difficult to distinguish transportation by a common carrier from transportation by a common drayman; nor is it difficult to draw the line between a sale on the Chicago Board of Trade and a sale at the village crossroads.

Upon this matter of uniformity, in addition to the cases on classification cited, I refer the court to the opinion delivered by Mr. Justice Miller, speaking for the court, in the *Head Money Cases* (112 U. S., 580, 594).

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provision of the Constitution, that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those

of another," because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all ports alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States. It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax Cases*, 92 U.S., 575, 612.) Here there is substantial uniformity within the meaning and purpose of the Constitution.

Also to the language of Mr. Chief Justice Waite, speaking for the court, in the case of *Tappan v. Merchants' National Bank* (19 Wall., 490, 504). In this case the validity of a statute of Illinois making separate provision for the taxation of national-bank shares at the place where the bank was located, instead of at the residences of the shareholders, was sustained:

But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules can not be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph

companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this.

XI.

There is no interference with the rights of the States to regulate contracts made within their borders. The memorandum is required as a means of collecting the tax. The lack of it does not invalidate the contract.

1. The memorandum is required simply as a means of collecting the tax. It is a very simple document. It must show the date of the sale or contract to sell, the name of the seller, the amount of the sale, and the matter or thing to which it refers. This is all. To this memorandum there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. There is a penalty provided for delivering the merchandise sold without making such memorandum, or for delivering the memorandum without affixing the proper stamp. All these provisions are proper and necessary to collect the tax. Congress does not attempt to regulate contracts made on exchanges so as to dictate what shall be valid and what not. Congress simply provides that a tax shall be levied upon each sale, agreement of sale, or agreement to sell on an exchange, and to collect this tax, requires a memorandum to be made

and a stamp, graduated according to the value of the sale, affixed thereto. I dare say Congress, if it had seen fit, might have adopted other means to collect this tax. The means to be adopted rested within the discretion of Congress. Congress might have required each member of an exchange to report periodically to the collector of internal revenue a detailed statement of his sales, to whom made, with the value thereof. In this way the tax could readily be computed. But such a provision would have been open to the palpable objection that it would require a public disclosure of the business transactions of each member of an exchange. It would have been bitterly contested on such ground, and very properly, too. The present provision is simple and unobjectionable. I venture to say no better means of collecting such a tax can be suggested.

2. In the case of telephone messages, made taxable under Schedule A, a sworn statement is required to be filed with the collector of internal revenue each month, stating the number of messages or conversations transmitted for which a charge of fifteen cents or more was imposed, and for each of such messages the telephone company is required to pay a tax of one cent. Here is a tax on telephone messages and conversations. It would be impossible to reduce the conversations to writing, and so no effort is made to collect the tax by the use of stamps.

(3) In the *License Tax Cases* (5 Wall., 462) the Federal law attacked required liquor dealers to take out a license, paying the United States for the same. A penalty was provided for the failure to take out the license. It was objected that the General Government can not

license the liquor traffic; that power belongs to the States. This court, speaking by Mr. Chief Justice Chase, answered that what Congress could not do the court would not assume it intended to do. The law, therefore, was treated simply as a tax law, the taking out of a license being part of the machinery for the collection of the tax. The following language is used, page 471:

The power to tax is not questioned, nor the power to impose penalties for nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

So in the present case the requirement that a memorandum shall be made and a stamp affixed is simply a method for collecting the tax.

XII.

The tax is not on personal property or the income thereof. It is therefore not a direct tax. It is a duty on the disposition or transfer of merchandise, which, payable in the first instance by the seller who voluntarily goes upon the exchange, may be shifted, in whole or part, to the buyer. It is therefore an indirect tax—an excise.

It is argued in one breath that this tax must be paid by the seller and can not be shifted to the buyer, and therefore is a direct tax. In the next, it is insisted that a tax on the sale of a commodity is a tax on the commodity itself, and therefore a direct tax.

This is the traditional coon trap, which catches the Government either "comin' or gwine." If the tax can not be shifted it is a direct tax, and if it can be shifted it is a direct tax. If it can not be shifted, and must be paid by the seller, it is a direct tax for that reason alone; if it can be shifted to the buyer, it inevitably falls on the commodity, is added to its price, and for that reason is a direct tax.

The court will have no difficulty in perceiving the fallacy of this double-barreled argument. What a direct tax is, found elaborate discussion in the recent income tax cases (*Pollock v. Farmers' Loan and Trust Co.*, 157 U. S., 429; 158 U. S., 601). Before the decision of these cases, the trend of authorities limited the meaning of a direct tax, as used in the Constitution, to a capitation tax and a tax on land. On the original submission of these cases, the court held that a tax on the rents or income of land is a tax on the land itself and therefore a direct tax within the meaning of the Constitution. On the rehearing, the court extended its definition of a direct tax so as to include a tax levied on personal property or the income thereof. Such is the extent to which the court went.

It never thought of holding that every tax that can not be shifted, and therefore must be paid by the person on whom levied, no matter whether based on his occupation or business or transactions, is a direct tax; nor of holding that every tax that can be shifted, and which ultimately falls upon goods or merchandise which have passed through the hands of the taxpayer, is a direct tax.

If opposing counsel are correct, practically every tax levied by the War-Revenue Act can be shown to be a direct tax, and therefore unconstitutional.

It is true that in *Brown v. Maryland* (12 Wheaton, 419, 444) it was held that a tax levied by a State on the occupation of an importer was the same as a tax on his imports, and therefore invalid, Mr. Chief Justice Marshall saying:

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.

So, in *Almy v. California* (24 Howard, 169), it was held that the duty on a bill of lading was the same thing as a duty on the article transported. And in *Cook v. Pennsylvania* (97 U. S., 566), it was held that a tax upon the amount of sales of goods made by an auctioneer was, when applied to imported goods, a tax upon the goods sold. The same doctrine has been held in other cases.

But in all these cases the court was endeavoring to ascertain whether a State, in violation of the inhibitions of the Constitution, had laid a burden upon interstate commerce, or had interfered with the exclusive right of the United States to levy duties upon imports. What the court was endeavoring to ascertain was not whether the tax was a direct or indirect tax, within the meaning of the Constitution, but whether the tax, directly or indirectly, operated so as to violate the Constitution. In all

these cases the court was seeking to ascertain the effect of the tax, where the burden would ultimately fall. In *Cook v. Pennsylvania*, the court did not hold that a tax on the sale of commodities was a tax on personal property and therefore a direct tax. On the contrary, the court held that a tax on sales was an indirect tax, which ultimately fell on the commodities sold and for that reason operated so as to violate the Constitution.

If the tax on the occupation of an importer, held invalid in *Brown v. Maryland*, is to be regarded as a direct tax, "because a tax on the sale of an article, imported only for sale, is a tax on the article itself," then, by the same token, all customs duties laid by the General Government upon articles imported into this country for sale are direct taxes.

Brown v. Maryland, and the succeeding cases, cited by opposing counsel, are clearly and tersely distinguished by Mr. Justice White in the dissenting opinion in *Pollock v. Farmers' Loan & Trust Co.* (157 U. S., bottom p. 646):

Nor can I see the application of *Brown v. Maryland*, 12 Wheaton, 419; *Weston v. Charleston*, 2 Peters, 449; *Dobbins v. Erie County Commissioners*, 16 Peters, 435; *Almy v. California*, 24 Howard, 169; *Cook v. Pennsylvania*, 97 U. S., 566; *Railway Co. v. Jackson*, 7 Wall., 262; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S., 326; *Laloup v. Mobile*, 127 U. S., 640; *Postal Telegraph Co. v. Adams*, 155 U. S., 688. All these cases involved the question, whether, under the Constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional.

Moreover, while this court has held invalid a State tax levied upon the transportation, or receipts, or business of a company engaged in interstate commerce, it has sustained a *direct tax* upon the property, or upon a proportion of the capital stock representing the property, owned or used in a State. Thus, in *Adams Express Co. v. Ohio* (165 U. S., 194), the court sustained a State law which levied a tax upon the proportion of the capital stock of the Adams Express Company representing property owned and used in Ohio. Mr. Chief Justice Fuller, speaking for the court, said, page 220:

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, can not be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. (*Postal Telegraph Co. v. Adams*, 155 U. S., 688.)

And so, in *Brown v. Houston*, (114 U. S., 623), a tax on coal transported from Pittsburg to New Orleans, and at the time of the general listing and assessment of

property in New Orleans, held in barges at the wharf, was sustained as a tax on property which had become a part of the mass of property within the jurisdiction of the State.

Turning again to the recent income tax cases, I do not recall any definition of a direct tax, by counsel or by the court, which would include the tax on sales or agreements to sell merchandise at exchanges, which is before the court. Mr. Edmunds argued against the income tax law. He gives the following definition of a direct tax (157 U. S., 491):

A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods which he may import or not import, as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being.

Duties, imposts, and excises are, in large degree, and almost universally, heavy or light upon each person, depending upon his own will.

* * * * *

Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the

whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement.

In another place (p. 487) Mr. Edmunds speaks of indirect taxes as those "which are intended to fall upon the movement of commodities and the voluntary occupations of men."

In the opinion of the court, Mr. Chief Justice Fuller thus defines direct taxes (157 U. S., 558):

Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

Mr. Justice Field, in his concurring opinion, thus describes excise taxes (157 U. S., bottom p. 592):

Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them.

In the opinion on the rehearing, in discussing the meaning of the words "duties, imposts, and excises," used in the Constitution, Mr. Chief Justice Fuller, speaking for the court, says (158 U. S., 622):

Cooley (on Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax tribute or duty,

but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In *Pacific Insurance Co. v. Soule* (7 Wall., 433), Mr. Justice Swayne, speaking for the court, adopts the following definition of an excise tax (bottom p. 445):

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. (Citing Bateman's Excise Law, 96; Story's Const., sec. 953; 1 Blackstone's Com., 318.)

(2) A direct tax is one which, under the recent definition of this court, is levied upon property, whether real or personal, or its income. Such a tax can not be escaped. It can not be shifted or moved on. But in the present case it is optional with the owner of any products or merchandise whether he will or will not sell or agree to sell them on an exchange. He goes upon the exchange of his own free will. It is a voluntary act on his part. If he goes there, he goes because it is profitable for him to go. He can get a better market, a better price, or a better contract. The element of free choice thus present is sufficient in itself to make the tax an indirect tax.

In the next place, the tax is upon the transfer of merchandise through an exchange. It is not upon the possession, but the disposition of property. It applies not only to sales where merchandise passes, but to agreements to sell where no merchandise passes, and where

none may pass. The tax is not therefore dependent upon the present ownership of property. Ownership may or may not exist.

(3) I am inclined to agree with Mr. Edmunds, when he said, in the argument in the Income Tax Case, that where an excise is laid upon the movement of commodities, while such tax is an indirect tax, yet the whole burden rarely falls upon the last man. It is borne partly by each agent in the movement. Where a duty is laid upon an imported article, I do not believe that in every instance the importer is obliged to pay the tax, and that he is able to shift the burden in turn to the next purchaser. I believe in some cases the foreign manufacturer, when a duty is laid, is willing to lower his price, so as to bear part of the duty himself. He may be willing to bear all of it in order to retain the market. So with the importer. If he is compelled to pay the duty, he may be able to add it in whole or in part to the price, or he may not. It depends upon the state of the market here and the competition he has to meet. Ordinarily, the duty is added to the price, and is ultimately paid by the consumer.

So in the case before the court. It is impossible in the ultimate analysis to predict with accuracy just where the burden will fall. The circumstances of each particular sale will control. Broadly, it may be stated that in the case of actual sales the tax, being one on the transfer of commodities through an exchange from the producer to the consumer, will be added to the price and ultimately paid by the consumer. But this depends

altogether on whether under the circumstances of the particular transaction the seller on the exchange has found it practicable to shift the tax to the buyer through an increase in the price. It may be that to make the particular sale he finds it to his interest to pay the tax himself. The same observation applies as between the broker and his patron. The law requires the seller to make the memorandum to which the revenue stamp shall be affixed. But it makes it a penalty for any agent or broker for such seller to make the sale or deliver the produce without the memorandum with the stamp affixed. The broker may demand, in addition to his commission, an amount to cover the tax, and he may get this, or he may be willing, in order to secure the patronage, to take care of the tax himself, in which case it comes out of his commission. If the outside dealer is willing to pay the tax in addition to the commission, it is because he thinks the privilege of selling on the exchange is worth that much. On the other hand, if the member pays the tax out of his commission, it is proof that he can afford to divide with the Government.

When we consider the enormous value of transactions on exchanges, where no actual tangible property passes, it will be seen that, to an immense extent, the tax will either be paid by the speculators in wheat, pork, sugar, and cotton, or by the brokers who grow rich from commissions paid by such patrons. Viewed in this light the tax is an especially salutary one.

XIII.

While the right to tax involves the right to destroy, the destruction of all exchanges and boards of trade will not follow inevitably if this tax is sustained.

Counsel for the Chicago Board of Trade is deeply solicitous about its future if this tax is sustained. He says the right to tax involves the right to destroy, and if Congress has a right to tax a transfer of commodities through the exchange, it may tax the exchange out of existence; it may make dealing on the exchange so burdensome that trade will go elsewhere. I suppose the same thing might be said of every subject taxed by the war-revenue act.

If Congress is permitted to levy a tax for \$50 on stock-brokers, it may increase the tax to \$50,000, and wipe stockbrokers out. In this way the knife would be put to the throat of the New York Stock Exchange.

So, if Congress is allowed to tax commercial brokers \$20, it may tax each one \$20,000, and this would just as effectually put an end to every produce, or live stock, or cotton exchange.

So, if Congress can tax manufacturers and dealers in tobacco, it can destroy the tobacco industry; if it can tax manufacturers and dealers in liquor and beer, it can wipe out the liquor trade and the breweries.

If it can tax telegraph and telephone messages, it can destroy the great sources of communication in this country.

If it can tax every shipment of freight on a railroad, it can make the transportation of freight so onerous as to

destroy all the great lines of transportation. And so on ad libitum.

It will be time enough for the produce exchanges and boards of trade to cry out when they are hurt.

XIV.

The tax on sales on exchanges is not a novel one. The act of 1864 practically levied such a tax.

The act of June 30, 1864 (13 Stat., 233), to provide internal revenue to support the Government, provided in section 99 (p. 273):

That all brokers, and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, or other securities, etc.

The tax upon all sales of merchandise, produce, or other goods was one-eighth of 1 per cent.

It is to be noted that the tax on sales of merchandise by brokers was in addition to the license tax of \$20 on commercial brokers. (See section 79, paragraph 14, p. 253.)

In *United States v. Cutting* (3 Wall., 441), the provision of section 99, as amended in 1865, came before the court in connection with that section of the act which requires brokers to take out a license. The court held that a licensed stock broker must pay a tax on the sale of stocks, bonds, and securities made by himself, as well as on those made for others. The case was argued by Messrs. Allen, Burrill, and Evarts for the stock brokers against the

Government, but the validity of the act was never questioned. It seems never to have suggested itself to these able lawyers that a tax on sales made by a broker who had paid a license would amount to double taxation or otherwise violate the Constitution.

In *Warren v. Shook* (91 U. S., 704) it was held that a banker doing business as a broker was subject, under the revenue act of 1864, to pay the tax or duty upon sales, Mr. Justice Hunt, speaking for the court, saying, bottom page 711:

The intent of Congress to subject to taxation all sales made by those engaged in the business of brokers is plain enough. When it was said (sec. 99) "that all brokers and bankers doing business as brokers shall be subject" to the duties specified, it was intended to encompass the entire class of persons engaged in the business of buying and selling stocks and coin.

CONCLUSION.

I concede that the question involved in these cases is an important one. It may be true, as Mr. Robbins says (brief, p. 62), that "unfortunately the inequalities of life are daily becoming more marked." From this he concludes that Congress should daily be less trusted, and that the court should strain a point to tie the hands of Congress and forestall legislation which he apprehends such inequalities may invite. He forgets that this tax was levied, not in a spirit of envy to even up with the fortunate in this world's goods, but in a spirit of patriotism to meet the emergency occasioned by a foreign war.

The Government is interested, not in keeping "an open door" through which to get at the "classes" in order to curry favor with the "masses," but in saving intact the sources of revenue, which have been available in the past, are needed now, and may be essential in the future to preserve and defend the Government itself.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX A.

Cases on the right to classify.

In *Barbier v. Connolly* (113 U. S., 31), (a case in which an ordinance of San Francisco prohibiting work in public laundries at night was sustained) the court, speaking by Mr. Justice Field, says, respecting the scope of the fourteenth amendment, that it was undoubtedly intended, by the adoption of that amendment, to provide—

That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * That no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

As applied to taxation, this interpretation has been repeatedly affirmed.

In *Bell's Gap R. R. Co. v. Penna.* (134 U. S., 232, 234), the tax on moneyed securities sustained, was assailed on the ground that there was a discriminating classification. The court held that as the law applied to

all corporate securities there was no discrimination. Mr. Justice Bradley delivered the opinion. On page 237, he says that the provision in the fourteenth amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways." Then he cites the various ways in which property may be classified, and says: "We think that we are safe in saying, that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation." Such a construction, he says, "would render nugatory those discriminations which the best interests of society require." He cites *Barbier v. Connolly*.

In *Home Insurance Co. v. New York* (134 U. S., 594), a tax imposed by the State of New York upon the corporate franchise or business of all corporations, whether foreign or domestic, doing business within the State, to be measured by the extent of the dividends of the current year, was sustained as a tax upon the privilege of being an incorporation, and doing business within the State in a corporate capacity, and not a tax upon the privilege or franchise, which, when incorporated, the company may exercise. Therefore, its imposition upon dividends did not violate the law exempting United States bonds from taxation, although a portion of the dividends were derived from interest on capital invested in such bonds. It was claimed there was discriminating classification, depriving corporations affected of the equal protection of the laws. As to this, Mr. Justice Field, speaking for the court, says, bottom page 606:

The amendment does not prevent the classification of property for taxation—subjecting one kind of

property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected.

In *Pacific Express Co. v. Seibert* (142 U. S., 339), in which a tax on gross receipts of express companies was sustained, the court, by Mr. Justice Lamar, says, page 351:

This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens.

In *Railroad Co. v. Gibbs* (142 U. S., 386), it was held that a law which assessed on railroads in South Carolina the expense of a State railroad commission, thus classifying railroads for the purpose of imposing on them a

specific burden, did not violate the guaranty of equal protection of the laws.

In *Missouri Pacific R. R. Co. v. Humes* (115 U. S., 512), a Missouri law imposing double damages on a railroad corporation for injury resulting from a neglect to fence its road, was sustained, Mr. Justice FIELD saying, for the court, bottom page 523:

The statute makes no discrimination against any railroad company in its requirements. * * * There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

In *Missouri Ry. Co. v. Mackey* (127 U. S., 205), a Kansas statute making railroad companies liable for injuries to employees resulting from the negligence of their fellow-servants, was sustained. Mr. Justice FIELD, in delivering the opinion of the court, says, page 209:

The greater part of all legislation is special, either in the objects sought to be obtained by it or in the extent of its application. * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.

In *Kentucky R. R. Tax Cases* (115 U. S., 321), Mr. Justice MATTHEWS, speaking for the court, says, middle page 337:

The rule of equality, in respect to the subject, only requires the same means and methods to be applied

impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect, which the discretion of the legislature has seen fit to impose.

See, also, bottom page 338, citing *Missouri v. Lewis* (101 U. S., 22, 30).

The following cases sustained laws assailed on the ground that they provided for unjust discrimination through classification :

Horn Silver Mining Co. v. New York, 143 U. S., 205 (Heavier tax on foreign than domestic corporations, held good.)

Munn v. Illinois, 94 U. S., 113. (Charge on elevators in Chicago to exclusion of other elevators in Illinois, sustained.)

Budd v. New York, 143 U. S., 517. (Law regulating elevator charges in cities having population of over 130,000, sustained.)

Missouri v. Lewis, 101 U. S., 22. (Special judicial provisions for particular localities of a State, sustained.)

Soonking v. Crowley, 113 U. S., 703. (San Francisco ordinance prohibiting work in public laundries at night, sustained.)

Wurtz v. Hoagland, 114 U. S., 606. (Special New Jersey law regulating assessment for drainage purposes, sustained.)

Watson v. Nerin, 128 U. S., 578. (Kentucky law regulating assessment for street improvement in Louisville, sustained.)

Minneapolis v. Beckwith, 129 U. S., 26. (Iowa act authorizing recovery double the value of stock killed, through neglect to fence, sustained.)

C. & M. W. Ry. Co. v. McLaughlin, 119 U. S., 566.

Hayes v. Missouri, 120 U. S., 68. (Special jury law for certain cities in Missouri, sustained.)

Dow v. Beidelman, 125 U. S., 680. (Arkansas law classifying railroads according to length, and regulating passenger charges, sustained.)

APPENDIX B.

Charter of Chicago Board of Trade.

Be it enacted by the people of the State of Illinois, represented in the General Assembly:

SECTION 1. That the persons now composing the board of trade of the city of Chicago, are hereby created a body politic and corporate, under the name and style of "The Board of Trade of the City of Chicago," and by that name may sue and be sued, implead and be impleaded, receive and hold property and effects, real and personal, by gift, devise or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the sum of two hundred thousand dollars) may have a common seal, and alter the same from time to time; and make such rules, regulations, and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

SEC. 2. That the rules, regulations and by-laws of the said existing board of trade shall be the rules and by-laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said association known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created, until their respective offices shall regularly expire or be vacated, or until the election of new officers according to the provisions hereof.

SEC. 3. The officers shall consist of a president, one or more vice-presidents, and such other officers as may be determined upon by the rules, regulations, or the by-laws of said corporation. All of said officers shall respectively hold their offices for the length of time fixed upon by the rules and regulations of said corporation hereby

created, and until their successors are elected and qualified.

SEC. 4. That said corporation is hereby authorized to establish such rules, regulations and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

SEC. 5. The time and manner of holding elections and making appointments of such officers as are not elected, shall be established by the rules, regulations and by-laws of said corporation.

SEC. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof.

SEC. 7. Said corporation may constitute and appoint committees of reference and arbitration and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses and issue subpoenas and attachments compelling the attendance of witnesses the same as justices of the peace, and in like manner directed to any constable to execute.

SEC. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the rules or by-laws, then, on filing such award and submission with the clerk of the circuit court, an execution may issue upon such award as if it were a judgment rendered in the circuit court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

SEC. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and

from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts, and the president or secretary is hereby authorized to administer such oaths of office as may be prescribed in the by-laws or rules of said corporation. Said bonds shall be made payable and conditioned as prescribed by the rules or by-laws of said corporation, and may be sued and the moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

SEC. 10. Said corporation shall have power to appoint one or more persons, as they may see fit, to examine, measure, weigh, gauge, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said corporation; and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation or others interested, and requiring or assenting to the employment of such weighers, measurers, gaugers, or inspectors; nothing herein contained, however, shall compel the employment, by anyone, of any such appointee.

SEC. 11. Said corporation may inflict fines upon any of its members and collect the same, for breach of its rules, regulations or by-laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation.

SEC. 12. Said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the management of boards of trade or chambers of commerce or as provided in the foregoing sections of this bill.

C

JOHN C. ANDERSON, Plaintiff,
vs.
The Western National Bank, Defendant.

BRIEF AND ARGUMENT FOR APPELLANT

BY **WILLIAM G. BROWN**

BY **JOHN G. CARROLL**

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1898.

No.

EDWIN S. SKILLEN,

Appellant,

vs.

JOHN C. AMES, United States Marshal for
the Northern District of Illinois,

Appellee.

} Appeal from Circuit
Court for the North-
ern District of Illi-
nois.

BRIEF AND ARGUMENT FOR APPELLANT.

This appeal, like that of *Nicol v. Ames*, No. 435 (set for argument December 12, 1898), raises the question of the constitutionality of that portion of the new Federal Revenue Act which requires a seller on an exchange to deliver to the buyer "a bill, memorandum, agreement or other evidence of such sale or agreement to sell," showing "the date thereof, the name of the seller, the amount of the sale and the matter or thing to which it refers," and differs from the *Nicol* case only in that Nicol made upon the Chicago Board of Trade a sale for present delivery of *existing* merchandise then owned by him, while appellant made an *agreement to sell* corn

for future delivery without having at any time any corn to deliver on such contract.

The record shows that on November 2, 1898, appellant, a citizen of Illinois and a member of the Chicago Board of Trade, agreed to sell to one Frank Harlow, also a citizen of Illinois and member of said board of trade, five thousand bushels of corn to be delivered at any time during the month of December next appellant should select, without delivering to said buyer a bill or memorandum of said agreement as required by said act, and that thereafter, on November 25, 1898, said Harlow agreed to sell to appellant a like quantity of corn to be delivered on any day in December next that said Harlow might select; and that thereafter, in accordance with the general usage in such cases on said board of trade, the one contract was off-set against the other and a settlement of both affected by the payment by appellant to Harlow of the difference in the selling prices of the two contracts, said appellant at no time having or owing the corn referred to in his agreement to sell nor any corn available for delivery thereon.

Upon an information by the District Attorney, reciting the foregoing facts, appellant was convicted in the District Court at Chicago upon proceedings similar to those in the *Nicol case*, and being committed to custody he applied to the Circuit Court for a writ of *habeas corpus*, which, after issuing the writ, remanded him to custody. Thereupon, appellant perfected the present appeal, and assigns as the only error the Circuit Court's refusal to decide the act unconstitutional and discharge him from custody.

As all the legal principles involved are discussed in the briefs, and will be upon the oral argument of the

Nicol case, a re-discussion of them in the present case would seem unnecessary.

For the reasons there given at length it is submitted that the judgment of the Circuit Court should be reversed and the case remanded with directions to discharge the prisoner.

HENRY S. ROBBINS,

Counsel for Appellant.

JOHN G. CARLISLE,

Of Counsel.

N. 636.

23

UNITED STATES COURT U. S.

FILED

DEC 13 1898

JAMES H. MCKENNEY,

Clerk.

Motion to advance.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1898.

Filed Dec 13, 1898.

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S. C.

No. 636

CHARLES H. INGWERSEN

vs.

UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

And now comes the plaintiff in error, Charles H. Ingwersen, by John S. Miller, his attorney, and moves that this case be advanced and set down for argument and hearing at such early day during the present term as the court may fix.

In support of said motion the plaintiff in error states as follows:

This case is a test case, involving the constitutionality of certain provisions of the internal-revenue or stamp tax act of 1898 as applied to sales of live stock at the Union stock yards, at Chicago, and other stock yards which exist at Kansas City, East St. Louis, Omaha, Sioux City, and other

places, and also the question whether such sales are within the said provisions of said act.

That by reason of the uncertainty whether the said tax is valid and applies to such sales, upon a large part of said sales and at certain of said stock yards, said tax has not been and is not being paid; upon other sales and at other of such stock yards said tax has been paid in some cases under protest and in others without protest, and some shippers of live stock to such markets are made to bear such tax and others are not; that the question of the constitutionality of the same provisions of said act as applied to sales upon boards of trade is involved in the case of *Nicoll vs. United States*, in this court, which has been advanced and is soon to be heard; that the question in the present case is one which, for public convenience, should be immediately decided.

JOHN S. MILLER,
Plaintiff in Error.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

John S. Miller, being sworn, says that the statements of fact in the above motion are true in substance and in fact.

Subscribed and sworn to before me this 11th day of December, 1898.

No. 636.

Brief of Miller for P. S.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

Filed Jan 3, 1899.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 636.

CHARLES H. INGWERSEN,

v.

THE UNITED STATES.

In Error to the District Court
of the United States for
the Northern District of
Illinois.

Hon. P. S. GROSSCUP, D. J.

BRIEF FOR THE PLAINTIFF IN ERROR.

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 636.

CHARLES H. INGWERSEN,	} In Error to the District Court of the United States for the Northern District of Illinois.
vs.	
THE UNITED STATES.	Hon. P. S. GROSSCUP, D. J.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This writ of error raises the question of the construction, validity and constitutionality of certain provisions of the Act of Congress of June 13, 1898, known as the "War Revenue Act."

The plaintiff in error was charged by criminal information in the District Court with violating the provisions of Section 6 and Schedule A of said Act of June 13, 1898, which imposes a tax "upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange or board of trade, or other similar place"—in that the plaintiff in error *at the Union Stock Yards, Chicago*, particularly described in the paper marked "Exhibit A," which is a part of said information, *did make sale of certain cattle* to one Moog, and did deliver to said purchaser a memorandum of the sale, *without then and there having the proper stamps affixed thereto* as required by said Act. (Printed trans. 2-5.) The United States Attorney made a part of the information as Exhibit A, a particular description of the place,—the Union Stock Yards, at Chicago,—at which the sale in question was made; and also a copy of the Charter and By-laws of the Union Stock Yard and Transit Company, which is a corporation for profit, and owns, maintains and operates the stock yards in question. (Pr. trans. 4-13.)

Distinctions between the case at bar and the Board of Trade cases recently argued herein.

The case at bar differs from the Board of Trade cases of *Nicol v. Ames, United States Marshall, No.*

435, and *Ex parte George R. Nichols*, No. 4 original, and *Skillen v. Ames, United States Marshall*, No. 625 (which were argued and submitted at the present term) in these respects:

In the Board of Trade cases, the sales were all made upon the floor of the trading room of the Chicago Board of Trade, to which, and to the privileges of trading upon which, only members of the Board of Trade are admitted. There was no question made that those sales were *within the terms* of the Act;—that they were made at an Exchange and Board of Trade. But in the case at bar the sale of cattle in question was made in one of the pens of the Union Stock Yards: and there is the question involved which is not in said Board of Trade cases, whether the sale here was, as the District Court here held, at a “similar place.” If the court holds, as the proper construction of the Act in question, that the sale here in question was not made “at any exchange or board of trade or other similar place,” then the decision of this writ of error in our favor may be made without necessarily deciding the question of constitutionality.

The learned Circuit Judge, in his opinion in the *Nicol case*, in passing upon and sustaining the constitutionality of the Act as applied to sales on the

floor of the Chicago Board of Trade, found the tax to be upon the *privilege of trading there* which is confined to members.

Nicol v. Ames, 89 Fed. Rep. (Nov. 1, 1898), 144.

If in the *Board of Trade Cases* the provisions in question of the Revenue Act are here held to be unconstitutional, that will determine the case at bar on that question in favor of plaintiff in error. But if in those cases the Act is held constitutional, that decision will not necessarily determine either the application of the Act to the sale in question in this case or its constitutionality as applied to such sales. If this court should hold upon the question of construction that the sale of cattle here in question was a sale "at an exchange or board of trade, or other similar place," and was subject to this tax, then the question of its constitutionality, as applied to this sale, will not necessarily be determined by a decision that the tax upon sales on the board of trade is constitutional, if such decision should be reached. As will be seen, there is no such *privilege* in the sale of cattle in the case at bar or other sales of live stock at stock yards. Any person can go there and sell or buy cattle or other live stock. The farmer or other person who has live stock to sell or who desires to

buy, may sell or buy as at the farm of the owner or other place where the live stock may be.

The material portions of said Act are as follows:

ADHESIVE STAMPS.

“*Section 6.* That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in said schedule.

SCHEDULE A.

STAMP TAXES.

“*Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale,*

or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent; *Provided*, that on every sale or agreement of sale, or agreement to sell, as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps, in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax, as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or *who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.*"

The Information; Motion to quash; Demurrer; Rulings thereon; Rulings on trial; Instructions; Conviction and Judgment.

The information, as preferred, contained two counts; but as to the first count there was a *nolle* entered, and it is not now material. In the second count it was charged that the defendant made a sale of cattle at the Union Stock Yards particularly described in Exhibit A, which is made a part of said information, and delivered the same to the purchaser and did deliver to the purchaser a memorandum of the said sale *without then and there having the proper stamps affixed thereto for denoting the payment of the internal revenue tax upon said sale and memorandum, as required by said Act, and did refuse, fail and neglect to affix any such stamps to said memorandum* (Pr. Trans. 3.)

The defendant Ingwersen moved to quash the information, and each count thereof, and also demurred to each count on the grounds, (1) that the information did not charge or state any offense; (2) that the said sales made by defendant in the information mentioned are not within the provisions of said act; (3) that the said sales, agreements of sale, or agreements to sell in the said information mentioned were not, nor was either of them, a sale, agree-

ment of sale, or agreement to sell "any products or merchandise at any exchange or board of trade, or other similar place," within the meaning of Schedule A of said Act of Congress; and (4) that the said Act of Congress, and the respective provisions thereof in said information mentioned, are in violation of the Constitution of the United States and void (Pr. Rec. 14-16).

The Court, upon argument, denied the motion to quash, and overruled the demurrer; to each of which rulings the defendant preserved exceptions (Id., 17).

Thereupon the defendant pleaded not guilty and was put upon his trial before a jury, and on such trial the Government entered a *nolle* as to the first count in the information (Pr. Trans. 18, 33). The trial proceeded on the second count. The prosecution proved the making of the sale, alleged in the second count of the information, at the Union Stock Yards, Chicago, and that the Union Stock Yards where said sale was made, was accurately described in Exhibit A to the information; and that the memorandum in question which was a "scale ticket" or certificate of the weighmaster of the Union Stock Yard Company of the weight, was made by the Union Stock Yard Company, and delivered to defendant

and by defendant to the purchaser; and that no stamp was affixed to said memorandum of said sale. (Pr. Trans. 29-34.) The evidence for the Government also showed the differences between a board of trade or exchange and the Union Stock Yards, and the course and methods of business at each. (Pr. Trans. 35 to 45.) We shall point out those differences further on. No evidence was introduced for defendant.

The defendant submitted to the court successively certain requests for instructions to the jury, each of which the court successively refused; and the defendant preserved exceptions to each of these rulings. (Pr. Trans. 45-46.)

The court instructed the jury peremptorily to return a verdict of guilty; to which ruling exception was duly taken. And the verdict of guilty as instructed by the court, was accordingly entered. (Id. 46.) The defendant moved for a new trial, which was overruled, and an exception to such ruling was preserved. (Id. 18, 46.) The defendant also moved for judgment *non obstante veredicto*, and in arrest of judgment, each of which were overruled and exceptions thereto preserved. (Id. 19, 46, 47.) Judgment upon the verdict was thereupon entered that defendant pay a fine of \$500, and that he stand committed to the county jail of Cook County, Illi-

nois, until said fine is paid, or he is otherwise discharged by law. To this an exception was preserved. (Id. 19, 47.) And to review said judgment this writ of error is sued out.

SPECIFICATION OF ERRORS.

1. The court erred in denying and in not sustaining the motion to quash the information.

2. The court erred in overruling and in not sustaining the demurrer to the second count of the information.

3. The court erred in holding that the sale referred to in the second count of the information was made at an exchange or board of trade or other similar place, within the meaning of Schedule A of the Act of Congress in question.

4. The court erred in refusing the following instruction requested by defendant:

“The court instructs you, Gentlemen of the Jury, that, in view of all the evidence in this case, the sales, agreements of sale, and agreements to sell in the information mentioned, were not, nor was either of them, a sale, agreement of sale, or agreement to sell any products or merchandise at an exchange or board of trade, or other similar place, within the meaning of Schedule A of the act of Congress approved June 13, 1898, entitled ‘An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes.’”

5. The court erred in refusing the following instruction requested by defendant:

“The court instructs you, Gentlemen of the Jury, that the Union Stock Yards in Chicago, Illinois, and the pens inclosed therein, which have been referred to in the evidence in this case as constituting the place at which sales, agreements of sale and agreements to sell, and each of them mentioned in the information herein, were made, did not constitute an exchange or board of trade, or other similar place, within the meaning of Scheduld A of the certain Act of Congress approved June 13, 1898, entitled ‘An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes.’”

6. The court erred in refusing the following instruction requested by defendant :

“The court instructs you, Gentlemen of the Jury, that the Act of Congress approved June 13, 1898, entitled ‘An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,’ in so far as it purports to apply to sales, or agreements of sale, or agreements to sell live stock at the Union Stock Yards, Chicago, Illinois, conducted as the evidence shows, the sales mentioned in the information were conducted, is in violation of Section 8 of Article I of the Constitution of the United States, requiring that all duties and imposts and excises shall be uniform throughout the United States ; and is also in violation of Section 9 of Article I of the Constitution of the United States, requiring that no direct tax shall be laid unless in proportion to the census or enu-

meration thereinbefore directed to be taken and that no tax or duty shall be laid upon articles exported from any state.

7. The court erred in giving the following instruction to the jury. (Pr. trans. 46):

“The law question in this case, Gentlemen of the Jury, was submitted to the court on the demurrer to the information. The only question was whether these stock yards was an exchange or a place similar to an exchange. If it was, the transactions on the stock yards are taxable under the revenue law. The court has held that it was such a place, and this proceeding is only to carry out the judgment of the court, so that an appeal can be taken and the question determined by the Supreme court. For that reason I will instruct you that it is your duty—that the evidence in this case shows that this defendant has violated the law; that the stock yards is a place similar to an exchange, and transactions on the stock yards must be evidenced by a memorandum in writing. There was such a memorandum, but it was not stamped. The failure to stamp it is a violation of the law.”

8. The court erred in giving the following instruction to the jury. (Print. trans. 46):

“I instruct you, Gentlemen of the jury, to return a verdict of guilty.”

9. The court erred in holding that the provisions of Section 6 and Schedule A of said Act were not in violation of the Constitution and void.

10. The court erred in holding that the provisions of Section 6 and Schedule A of said Act of Congress as applied to the sale in question, were not in violation of Section 8 of Article One of the Constitution of the United States, which provides that all duties, imposts and excises shall be uniform throughout the United States.

11. The court erred in holding that Section 6 and Schedule A of said Act of Congress were not in violation of Section 9 of Article One of the Constitution, which provides that no direct tax shall be laid unless in proportion to the census or enumeration thereinbefore directed to be taken; and in holding that Section 6 and Schedule A of said Act of Congress were not in violation of Section 2 of Article I, of the Constitution, which requires that direct taxes shall be apportioned among the several states, according to their respective numbers.

12. The court erred in not holding that Section 6 and Schedule A of said Act, as construed and applied by the court, deny to plaintiff in error the equal protection of the laws.

13. The offense of which the defendant was adjudged guilty was the making of a sale of merchan-

dise at a place similar to an exchange or board of trade without having the proper stamps affixed to the memorandum of such sale; and the words of said Schedule A, "or other similar place," do not define or describe any place with sufficient certainty to describe or define or create any offense or part of any offense, or impose any obligation upon this defendant or justify a conviction herein. And the District Court should have so held.

14. The court erred in instructing the jury to return a verdict of guilty.

15. As to each of said motions—for a new trial, for judgment *non obstante veredicto*, and in arrest of judgment,—the court erred in denying the same.

16. The court erred in rendering judgment against the defendant.

BRIEF AND ARGUMENT.

I.

The words "at any exchange or board of trade or other similar place," in Schedule A of the Act in question, refer to the place of sale; and they mean the room or floor or place provided by associations of that kind for trading among their members, and to the privileges of which only members are admitted. And the tax levied is only upon sales at those places.

1. The terms exchange, and board of trade, are used in two senses: (1) of an *association* of persons, which, by its rules or by-laws, regulates the business conduct of its members; and which usually provides for its members a room for their buying and selling with each other, to which only members are admitted to the privilege of buying and selling. And (2) of the *room or place* so provided by such an association. Bouvier Law Dic. (Rawle's Ed.), title, Stock Exchange. And when used in the latter sense, the term exchange is frequently contracted to 'Change or 'on 'Change." And so a membership is frequently termed a seat.

It is an exchange or board of trade in this latter sense that is meant by the words in Schedule A of the Act in question.

Their names usually designate them as an exchange or board of trade, for instance; the London Stock Exchange; the New York Stock Exchange; the New York Produce Exchange; the St. Louis Merchants' Exchange; the New Orleans Cotton Exchange; the Chicago Board of Trade; the Kansas City Board of Trade. But in the names of some these words do not appear. For instance, the Milwaukee Chamber of Commerce; the Minneapolis Chamber of Commerce; the Philadelphia Board of Stock Brokers; the San Francisco Stock and Exchange Board, etc. Hence the use in the Act of the words "or other similar place."

But a distinguishing feature of each of these exchanges or boards of trade, or other similar places, when the term applies to a place at which sales are made, is, that it is a room or place for buying and selling, which is provided by the association for its members and to the privileges of which only its members are admitted.

This is a fact of common knowledge, and appears in adjudged cases and works of standard authority; and must be held to have been known to and in contemplation of Congress in passing the Act in question. It appears in the following among other authorities: Dos Passos, Stock Brokers, 88, 208-9; Melsheimer & Laurence, Stock Exchange, 1-2; Bisbee &

Simonds, Produce Exchange, 71; *Speight v. Gaunt*, L. R. 22, Ch. Div. 724 per JESSELL, M. R.; *Leech v. Harris*, 2 Brewst., 575, 587; *Metropolitan G. and S. Exch. v. Board of Trade*, 15 Fed., Rep. 849.

In *Melsheimer & Laurence on the Stock Exchange*, pp., 1-2, it is said that "members alone (and their clerks), have a right of entry to the Stock Exchange for the transaction of business."

In *Bisbee & Simonds*, Law of Produce Exchange, p. 71, it is said that "no member receives any pecuniary profit from the corporation or from its capital or revenue, *except such advantage, in the way of trade, as may result from the right to enter the room of the Exchange and there transact business.*"

Mr. Dos Passos, (Stock Brokers, p. 88), says that "a seat in one of these bodies is a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place."

In *Speight v. Gaunt*, L. R. 22, Ch. Div., 724, JESSELL, M. R. mentions the fact that if a man desires to buy stock on the Stock Exchange it is absolutely necessary for him to employ a stock broker.

In *Leech v. Harris*, 2 Brewster, 575, 587, the court, in defining the Philadelphia Board of Brokers, say that the members "have associated themselves to provide a common place for the transaction of their individual business."

In *Metropolitan G. & S. Exch. v. Board of Trade*, 15 Fed. R. 849, the court says of the Chicago Board of Trade, that "it does not and is not by its powers, authorized to deal in any kind of commodities, but it has provided a large exchange room, fitted up with suitable accommodations, where the members meet at stated times and buy and sell among themselves."

In Bouvier's Law Dictionary, a Stock Exchange is defined as a building or room in which stock brokers meet to transact their business of purchasing or selling stocks.

In the Century Dictionary an exchange is defined as "a place where the merchants of a city in general, or those of a particular class, meet at certain hours daily to transact business with one another by purchase and sale."

With such exchanges or boards of trade, which provide such places for trading to their members, the chief privilege of membership is access to such room or floor of the exchange for the purpose of trading thereon. It is chiefly the necessity and value of having that right to enter and trade there, which compels or induces brokers to join, and which gives the great value to memberships or seats. And the principal and effective means, which exchanges providing such trading rooms have, of disciplining their mem-

bers, is the power to deprive them of such access and right to trade upon the floor of the exchange.

It is believed that there is no exchange or board of trade, or other similar place, in the United States, at which buying or selling is done, where the privilege to enter and trade there is not confined to members or their clerks.

The evidence in this case shows (and this court can look at the evidence because the court instructed the jury to return a verdict of guilty) that an exchange or board of trade, as a *place* of sale, is a room provided by the association to its members for trading among themselves, and that the privilege of there buying and selling is confined to the members of the association. Mr. BAKER, a witness for the prosecution, testified that he was on the Chicago Board of Trade for a number of years; that the Board of Trade is a room or hall provided in which the members and their duly accredited employees buy and sell cereals and provisions. That the goods which are the subject of sale are not there present. That the liberty of going upon the floor of the Board and buying and selling there does not exist except to members, and that any business transacted on the Board of Trade must be transacted by or through a member of the Board, and that the trades on the Board of Trade are carried on within what is known as this Exchange or Board

of Trade Hall; that sales on the Board of Trade are public sales—that is, any member or his employee present or having the desire to hear, may hear the sale. (Pr. Rec. 35, 36, 38.) And his evidence is that the above is a fair description of an exchange as a place “at which buying and selling is done.” (Id. 37.)

Plainly the words “any exchange or board of trade” in the Act refer to such a place of sale,—to the trading room or floor provided by such an association, the privileges of which are confined to members. That is put beyond question by the connection in which they are used, viz.: “*at any exchange or board of trade, or other similar place.*” And plainly the words “exchange” and “board of trade” are themselves used of similar places. There is but one *kind* of place prescribed. That, too, is shown by the use of the words “or other similar place.”

Mr. Solicitor General RICHARDS, in his brief for the government in the *Nicol case* (p. 19), states that the Chicago Board of Trade owns a building which cost \$1,800,000., and that it has about 1,900 members, and the initiation fee is \$10,000.; and (Id. p. 20) that “*visitors are not permitted to negotiate or transact any business in the Exchange rooms*” (citing Bisbee & Simonds on Produce Exchanges, p.

323). And thereupon the learned counsel draws this conclusion (p. 21):

"I think it sufficiently appears from what I have said that the seller on an exchange enjoys facilities or privileges which the outsider does not. It is in view of these privileges, if not because of them, that this tax is levied. It is on the sale or agreement to sell under special or exceptional conditions that the charge is imposed. The tax is not a tax upon the memorandum, or upon the commodity sold, or upon the occupation of selling; it is not a tax upon the sale or agreement to sell a part from the privilege enjoyed in making the sale on an exchange, but it is upon the sale as made, on an exchange, under the conditions and with the privileges inseparably connected with such sale."

Counsel thus felt compelled to draw the line defining the place at which the sales which are subject to the tax must be made. And the line so drawn does not include, but excludes from the tax, the sale of cattle here in question as we shall show. The "facilities or privileges" which "the seller on an exchange enjoys," and "which the outsider does not," which counsel so regards the distinguishing feature, is the right to enter and sell and buy upon the exchange, *i. e.* the room or floor where the selling and buying is done, which "the outsider" does not have.

In other words, Mr. Solicitor General here gives to the Act, if we understand him, the construction which we contend for, viz., that "an exchange or board of trade, or other similar place," within the meaning of the Act is a place for selling and buying, from the privilege of trading at which "outsiders" *i. e.* non-members, are excluded. By that token, the sale of cattle in question by plaintiff in error was not subject to the tax because it was not made at an exchange or board of trade, or other similar place. And in order to bring the sale in question within the tax, counsel must break down the distinction which, in the *Nicol case*, he found it necessary to recognize. And if that distinction is given up, in an attempt to bring sales of live stock in the pens of the Union Stock Yards within the tax, no other can be found on which any such classification of the subjects of the tax can be based as is required to sustain the tax as uniform. Counsel will then find new difficulties in the question of constitutionality.

And the learned Circuit Judge, in his opinion in the *Nicol case*, recognized the same line of distinction and classification that it was the privilege, which members of an exchange or board of trade had, of entering and trading in the hall of the association

that marked the sales which are here the subject of the tax.

2. The words "or other similar place" in Schedule A of the Act do not bring within the tax, but exclude therefrom, sales at any different place. The same definition and line of distinction applies to those words. It is a place where the privilege of entering and buying and selling is confined to certain persons and where the "outsider" is excluded from such privilege.

The rule is that when general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned. *Harlow v. Tufts*, 4 Cush. 453. But the word "similar" is express and makes resort to the rule unnecessary.

But these words "or other similar place" show that the previous words "exchange" and "board of trade" are used synonymously, *i. e.* they have the same distinguishing characteristics. "Exchange" is not a broader nor a narrower term than "board of trade." It is other similar place, not places; and similar to one thing, not to two different or dissimilar things. And the essential feature common to all as places of sale, within the meaning of the Act, is that the privilege of entering and selling and buying there is confined to members.

If these words "or other similar place" are to be construed as the District Court construed them, we shall later contend that they are void for indefiniteness.

II.

The Union Stock Yards at Chicago or its pens, in one of which the sale in question was made, or other similar stock yards in the United States where live stock is received and where it is sold by the owner or by his agent, are not exchanges, or boards of trade, or other similar places, within the meaning of the Act in question.

At the Union Stock Yards, there is no room or place provided by any Exchange or Association for trading by its members. The Stock Yards, as averred in the information herein, are owned, managed and controlled by the Union Stock Yard and Transit Company, a stock corporation for profit, of which plaintiff in error is no part (Pr. trans. 3 to 9). There is no privilege here at all such as is conceived to exist in the case of sales on the floor of a board of trade or "on 'Change."

Any person is at liberty to send, take or receive cattle into said yards, and there place, or have the same placed in a pen or pens, and there sell any cattle belonging to him or which he has the right to sell. And any person desiring to buy has access to such pens for that purpose, and, has the liberty to

purchase, and sales there are private sales. (See information, Exhibit A, Pr. trans. p. 4).

The information contains as a part thereof, a description of the place where it is averred the sale in question was made, as follows:

“The Union Stock Yards described in this information at the respective times therein mentioned, and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street and Forty-seventh street and Halsted street and Ashland avenue, in the City of Chicago, County of Cook and State of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the City of Chicago, extend into the yards, over which cattle, hogs and other live stock received at or shipped from the Union Stock Yards are carried. Upon the arrival of cattle, hogs or other live stock at the Union Stock Yards consigned to the commission merchant at the Union Stock Yards, *such cattle, hogs or other live stock are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are*

there cared for, fed and watered by such owner or consignee. Any person is at liberty to send, take or to receive cattle, hogs or other live stock into the Union Stock Yards, and there place or have the same placed, in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell. Any person has access to the pens containing cattle, hogs, or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs and other live stock in the yards are at private sale. Commission merchants having cattle, hogs or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found, take him to the pens in which such live stock is contained and there exhibit such live stock, and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs and sheep in the yards are by weight, and upon a sale thereof being made such livestock is taken by the owner or commission merchant having charge thereof from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Stock Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company, and in charge of the scale in which said livestock are weighed and the weight of such livestock is thereby determined as the weight for which the purchaser pays upon his purchase,

and the amount of the purchase price at the price per pound or hundred pounds fixed in such sale is thereby determined." (Print. Trans. 3, 4, 5.)

We admit that the above description does not meet the definition or meaning of an exchange or board of trade or other similar place. Whether it would come within the broader definition of a "market," which is different from and much broader than an exchange or board of trade or other similar place, is not perhaps material. If it did, it would not, for that reason, be within this tax, because there are many markets which are not exchanges or boards of trade or other similar place.

MR. BAKER, for the prosecution, testified that the above description contained in the information, was a correct description of the stock yards so far as it went, and stated substantially the method of doing business in the stock yards (Pr. Tr. 34). And he further testified, upon cross-examination, that anybody is at liberty to deal at the Union Stock Yards and their pens, either as a buyer or as a seller of live stock (Id. 35). That on the Board of Trade neither the Board of Trade itself nor the merchants who deal thereon have the responsibility for the care and safe keeping of the property dealt in while it is the subject of the deal, but that at the stock yards

the commission man, receiver or consignee is responsible for the custody and care of the stock, to feed, water and care for them (Id. 37). That a very small proportion, from five to ten per cent. of the animals brought into the stock yards are bought by the commission men; that the class of cattle that the commission men buy are thin cattle, known as "stockers" or "feeders," which they purchase for their customers to take back into the country; and that the fat cattle are bought by the representatives of the eastern buyers located at Chicago and the slaughterers. That practically all of the live stock are shipped to commission men, but that very frequently the owner consigns the stock to himself and then turns it over to a commission man for sale, and in some few isolated instances sells it himself. That the custom is for the commission man who receives the live stock,—he knows about what class of buyers will handle each class,—to go with his proposed buyer to the pens containing the stock. (Pr. Trans., 37-45).

It will be observed that the information and evidence herein show that the live stock received at the Union Stock Yards upon their arrival "are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are there cared for, fed and watered by such owner or con-

signee"; and that "such live stock is sold in the pen in which they are yarded." (Pr. Trans. 4, 33-34, 37). They are handled and sold there as they would be at the farm of the owner.

The District Court held that the pens of the Union Stock Yards, as they are shown in the information, were a "similar place" to an exchange or board of trade within the meaning of the Act. On the other hand, we contend that they are not in any respect such a similar place. They are similar to a farm or place where products or merchandise are present and sold at private sale.

So it is clear both from the information itself and from the evidence that the sales in the pens at the Union Stock Yards are not sales in any exchange or board of trade or other similar place within the construction which we have contended, and the line of distinction laid down by counsel for the government in the *Nicol* case.

The Live Stock Exchanges are not places of sale, and do not provide nor in any manner control the places of sale of live stock at the stock yards.

It may be said that there exist at different stock yards associations of dealers known as live stock exchanges, the character of two of which, made up of dealers at the Kansas City Stock Yards, was before

this Court in the cases of *Hopkins v. United States*, 171 U. S., 578, and *Anderson v. United States*, 171 U. S., 604; and counsel for the Government refers to those cases in his brief in the *Nicol case*. But of those the following facts are to be noted :

(1) Those cases had to do with the question whether the employment of commission merchants for the sales of live stock there in question or such sales of live stock, were interstate commerce, and with the nature and validity of the mutual agreements, and rules, and regulations of the members of the Live Stock Exchange.

(2) These live stock exchanges are not *places* at which sales are made. Schedule A of the Act in question, as we have stated, makes the *place of sale* the distinctive criterion. The tax is levied upon sales made "at any exchange or board of trade or other similar place." The sale here in question was not at a live stock exchange, but in a cattle pen of the Union Stock Yard and Transit Company. Those live stock exchanges, as appears in the cases cited, are mere associations or mutual agreements of men, for the regulation of the conduct of their members. No sale is or could be made at them. They provide no place at which sales are made or business is transacted, and attempt to exercise no sort of control over or regulation of the stock yards or any part thereof,

or the pens where the sales are made. The stock yards are owned and conducted and controlled by the stock yard company. All of that appears in the records of the cases cited, and fairly appears from the opinions of this Court therein. The live stock in the yards are cared for by the owner or consignee.

There are many associations known as exchanges which are not places and do not provide places where sales are made. At Chicago there are a Builders' and Traders' Exchange, a Gravel Roofers' Exchange and the Commercial Exchange, made up of wholesale grocers; the Lumbermen's Association of Chicago; the Flour and Feed Dealers' Association, etc. And so in other cities. No sales are made at these exchanges or associations.

(3.) Sales at the stock yards and in their pens need not be, and are not, in all cases, made by members of these live stock exchanges, nor by commission merchants. Any person may there sell or buy. That appeared in the record of the *Hopkins case* above referred to (p. 166); and it further appeared from the allegations of the bill of complaint of the United States, and from the answer and evidence in that case, that the stock yards at which the sales were made were owned, controlled, operated and managed by the Kansas City Stock Yards Company. And this also appears from the report and opinion

in the case in this court. And it appears from the record in the case at bar that the Union Stock Yard and Transit Company do own and control the yards at Chicago. (Pr. trans. 4.) And that the live stock in the yards are cared for by the owner or his agent. And it also appeared by the record in the *Hopkins case* that persons owning live stock and desiring to sell the same at the Kansas City Stock Yards are under no obligation whatever to employ a commission merchant or a member of said exchange, but are at full liberty to act for themselves in making such sales, and said Kansas City Stock Yards Company extends to such persons all the privileges and facilities afforded by said company, that any persons desiring to purchase live stock may and do deal with and buy from the owners direct, and that any person who desires to buy cattle at said stock yards, although not a member of said Live Stock Exchange is at perfect liberty to purchase the same from any person whatsoever, and that the larger part of the cattle purchased for the purpose of being fed and improved in condition are purchased without the intermediation or employment of any commission merchant. (Printed Record in *Hopkins case*, pp. 166, 176, 178.) And it appears from the record in the case at bar, both from the information and from the evidence, that at

the Union Stock Yards at Chicago any person may sell or buy live stock. (Pr. Trans. 4, 35, 43-44.)

(4) Schedule A of the Act in question, as construed and applied by the District Court in this case in the instructions to the jury, does not confine the tax imposed to sales by members of any live stock exchange. There is nothing in the record whatever to show that the plaintiff in error is a member of a live stock exchange; or that the sale in question was made under any supposed privilege or advantage gained from membership of a live stock exchange; or indeed that one exists at the Union Stock Yards. But the court held that the *Union Stock Yards was a place similar to an exchange*; and under that ruling the tax imposed is upon *all sales* of live stock made at the Union Stock Yards. But if plaintiff were shown to be a member of the Chicago Live Stock Exchange, it would be of no sort of importance. The Government cannot claim that if a member of the Chicago Board of Trade or of the New York Stock Exchange, should sell products or merchandise at his office or farm or elsewhere than on the floor of the board of trade or exchange, such sale would be subject to the tax. The Chicago Live Stock Exchange is not a place; and no such place is known; and no sale could be made thereat.

The sale of cattle by the commission merchant is as a mere agent as shown by the *Hopkins case*, and is the sale of the principal or owner. And the sale may be made by the owner. In either case, under the ruling of the District Court, the Act in question levies the tax *upon the sale*; and so *the tax would fall upon the owner of the cattle whether the sale is made by an agent or by himself*.

It is, therefore, immaterial that live stock exchanges exist which are mutual associations for the regulation of the business conduct of their members, and are made up of dealers at the stock yards, but which are not themselves and which do not provide places for trading. No sales of live stock are made at such exchanges.

And in the case at bar the information did not aver nor did the District Court adjudge that the sale in question was made at one of these live stock exchanges. And no sale was ever so made. This case proceeded entirely on the basis, and the Court so instructed the jury that *the Union Stock Yards was a place similar to an exchange or board of trade*.

It appears from the evidence that the Union Stock Yard and Transit Company have in the stock yards an office building, and that in this building the commission merchants have their offices, which they rent from the Union Stock Yard and Transit Company.

But the sales are not in or at that building; but, as averred in the information and proved, they are made *in the cattle pens* in the yards in which the stock sold is confined. There are some 5,000 of these pens, which cover about 200 acres. (Print. trans. 4.) The pen in which an owner's cattle are for the time confined is his pen, in which he or his consignee and agent cares for his cattle and sells them as he might in the yards or pens on his own farm.

III.

If it was competent for Congress, as contended by counsel for the Government in the Board of Trade cases to put into a class for the purposes of taxation sales made on 'Change,—it is not possible to bring within that class sales of cattle in the pens of the Union Stock Yards, and still preserve the uniformity required by the Constitution.

We are not here called upon to argue the question of the constitutionality of the War Revenue Act of 1898, as applied to sales upon the floor of the Chicago Board of Trade or of other exchanges which afford to their members only a place for trading with each other. That has been very ably and convincingly presented by the counsel for the appellants in the *Chicago Board of Trade Cases* above mentioned. As we have before stated, if their arguments shall prevail, and it be held in those cases that the provi-

sions of Section 6 and Schedule A of the Act in question are unconstitutional, that decision will dispose of this case in favor of the plaintiff in error. But if in the *Chicago Board of Trade Cases* the provision of the Act in question, as applied to sales upon the floor of the Chicago Board of Trade, be held to be constitutional, for the reason laid down by the Circuit Judge in his opinion in the *Nicol case* and contended for by Mr. Solicitor General Richards in his brief in those cases, viz: that it was within the power of Congress to classify sales upon the floor of such an exchange as proper subjects for taxation, because of the privilege of there selling which members alone enjoy, and that the tax in question is imposed uniformly upon the members of that class,—still that decision would not control or determine the constitutionality of the Act as applied to sales of cattle in the pens of the Union Stock Yards at Chicago. If the exercise of the privilege of selling products or merchandise upon the floor of an exchange or board of trade, which is confined to the members of such association, is the criterion for the classification of the subjects of taxation, and if the Act, as applied to such sales, is held to be constitutional, as imposing a uniform tax upon all sales of that class,—that classification excludes the sale of cattle here in question. Here, as we have shown, the

seller of cattle in the pens of the Union Stock Yards exercises no privilege. Such right of sale is free to all. And this is not only so in fact, but it is necessarily so from the nature of the Union Stock Yard and Transit Company and the character and extent of its business. (Print. trans. 5 *et seq.*)

The judgment herein, construing and applying this Act to the sale in question, requires an arbitrary and unfair discrimination which is in violation of the Constitution.

It will be borne in mind that the evidence in this case shows that upon the arrival of live stock at the Union Stock Yards, such live stock is placed by the owner or consignee thereof or his agents in one or more of the pens, and is there cared for, fed and watered by such owner or consignee. That any person is at liberty to send, take or receive cattle, hogs or other live stock into the Union Stock Yards, and there place, or have the same placed, in a pen or pens, care for the same, and there sell any cattle belonging to him, or which he has the right to sell. That any person is at liberty to purchase there or negotiate for the purchase of such live stock; that sales of the live stock in the pens are at private sale; and that such live stock is sold in the pen in which they are yarded (Pr. Trans., 33-34). We have already shown that there is a very wide dissim-

ilarity between such sales at the Union Stock Yards and sales upon the Chicago Board of Trade, or the New York Produce Exchange, or the floor of any other similar association, where the property sold is not present and where the privilege of selling is confined to the members of the association. Now it requires no argument or words to show that the sales of live stock at these yards, while so unlike sales at an exchange or Board of Trade, are similar to sales in pens or yards of the owner of the live stock at his farm, or elsewhere, wherever he may own or hire the yards in which his live stock is placed. In other words, as a place of sale, the pens of the Union Stock Yards are similar to the pens of the owner of the live stock at his farm or elsewhere. The pens at the stock yards in which his live stock is for the time being confined are *his* pens, in which he or his agent cares for his live stock, and in which he may sell them. The only difference is that the owner, or his agent, pays to the Union Stock Yard and Transit Company a charge for yardage, or, in other words, for the use of the pen and the facilities for yarding and caring for the live stock. At his own farm or ranch, he provides those yards and facilities himself; but at other places along the road where he might be driving his live stock to or from his farm or

ranch, he would hire such yards and facilities as he does at the Union Stock Yards. It is a matter of common knowledge that cattle and sheep are driven to and from ranches and feeding grounds, and to and from railway stations, sometimes many hundred miles apart. At ranches or farms along the way, and at railway stations throughout the great West, are pens in which such live stock are confined and fed and watered, and from which, at railway stations, they are loaded or unloaded to and from trains. And it is well known that live stock is frequently sold at all of these places as well as in the pens or yards at the farm or ranch or in the pens of the stock yards in the various cities where such yards are to be found. It is a wellknown fact that at hundreds of railway stations throughout the stock-raising states and territories, *e. g.*, Illinois, Iowa, Missouri, Nebraska, Montana, Colorado, Kansas, New Mexico, Oklahoma, Indian Territory, and Texas, pens for live stock are maintained, where stock is yarded for hire and are cared for and fed and watered by the owners of the live stock, and loaded and unloaded; and that at such pens live stock is frequently sold. At distilleries there are pens for yarding and feeding cattle, and sales are made there. If the pens of the Union Stock Yards are to be held to be an exchange or board of trade, or other similar

place, within the meaning of Schedule A of the Act in question, and these other several pens and places above mentioned, in which the owner or consignee places and cares for and sells or buys live stock, are not, the Act is not based upon any classification nor uniform. Sales in the pens or yards, upon the farm or ranch are not capable of distinction. Sales at country fairs are similar. If the words "exchange or board of trade" in the Act are to have any wider meaning than that which we have above contended for, viz: the floor or hall of an exchange or board of trade, the privilege of selling upon which is confined to members and denied to "outsiders,"—then no line can be drawn which is based upon any proper grounds for classification. The classification, if there then is any, would be purely arbitrary. But the Government does not contend that the tax is imposed upon sales at the places above mentioned. But if the line is broken, down which distinguishes sales made upon the floor of exchanges or boards of trade from all other sales, then there is not any possibility of classification within the requirement of uniformity.

There would be no basis for classification between sales of cattle, as products or merchandise, by the owner or his agent in the pens of the Union Stock Yards, and the sales of merchandise by the owner

thereof over the counters of the great department stores. In these stores, it is a well known fact that the owners of certain kinds of merchandise,—say hardware, or boots and shoes,—place their merchandise in the proper department in the store of another proprietor and pay such proprietor of the store for the right to sell or for the sale of their merchandise therein. Hither purchasers resort and buy the merchandise at the place where it is kept. There is much more similarity between the sales in such stores and the sales of cattle at the Union Stock Yards than there is between such sales of cattle and sales upon the floor of the Chicago Board of Trade or the New York Produce Exchange. But no such tax is required to be paid upon those sales.

There are certain districts in great cities which are given up in great part to the sales of vegetables and fruits, poultry and game, by commission merchants. South Water Street, in Chicago, is such a district in that city. Here the fruits from the fruit growing districts in their season are sent to the commission merchants whose stores are upon that street, and are there exhibited upon the sidewalk and in their stores and are there sold. And so with vegetables and poultry. Those sales are very similar to the sales of cattle at the Union Stock yards,—much

more similar than are the sales upon the Chicago Board of Trade or the New York Produce Exchange. And there is an association of those dealers for their mutual business advantage. But the Government imposes no tax under this provision of law upon those sales.

In another section of the city of Chicago, within a wide area of West Randolph street, known as the "Haymarket,"—celebrated for the great tragedy committed there, known as the Anarchist riots and murder,—the farmers bring in their hay and other products for sale each day during the season, and there traders, sellers and persons desiring to buy, resort and buy. Is this an exchange within the meaning of Schedule A of the Act in question? Such places exist in many large cities. The Internal Revenue Department requires the payment of no tax for any sales at such places under this Act. It is the construction of the Government, then, that sales at those places are not subject to the tax. But an attempted line of distinction or classification which includes within the subjects of taxation sales of cattle made in the pens of the Union Stock Yards, and at the same time excludes, as not within the tax, sales made at these other places mentioned, is purely arbitrary, and a tax so levied lacks the uniformity required by the Constitution.

In most counties, and in many towns, annual fairs are held at fixed places and prizes are offered for quality of products and merchandise, and products and merchandise are there sold and bought. They are not regarded by the Internal Revenue Department as exchanges or boards of trade, or other similar places, within this Act. But an attempted classification which excludes them and includes the sale here in question is entirely arbitrary.

The principle of uniformity and equality is fundamental in taxation in any system of free government. This is treated as axiomatic in all works of authority upon the subject. It was conceded in the argument for the United States in the *Income Tax Cases* (157 U.S. at p.474-5), that there is a uniformity requirement involved in the very word "tax"; and that it is guaranteed by the Fifth Amendment to the Constitution. And it was stated by Mr. EDMUNDS in his argument in those cases that it is now understood that the equal protection of the laws which is guaranteed by the Fourteenth Amendment is given by the Constitution against Federal as well as State action; and that "it was not necessary to say that Congress is not to deny to anybody the equal protection of the laws, because no power was delegated to do such monstrous things." (157 U. S., 498.)

It was elaborately argued in the *Income Tax Cases*, and by counsel for appellants in the *Chicago Board of Trade Cases* that the requirement of the Federal Constitution that indirect taxes shall be uniform throughout the United States, requires not simply geographical uniformity but uniformity between individual taxpayers or members of a class. The counsel for the Government in the *Income Tax Cases*, on the other hand, while conceding that under other provisions and by the spirit of the Constitution there was a requirement of uniformity between individuals and members of the class, contended that this particular provision only required a geographical or territorial uniformity. In view of the thoroughness of the argument upon this question in the other cases referred to, the writers do not feel justified in imposing upon the court any elaborate argument on that question. It is enough, however, for the purposes of this case, that the underlying principles of taxation, and the spirit of the Constitution, and the principles of the Fifth and Fourteenth Amendments require that in the enactment of tax laws as well as other legislation the people of the United States shall, within a reasonable and attainable limit, be treated alike. This, as stated above, was substantially conceded by the counsel for the Government in the *Income Tax Cases* and by Mr. CARTER

in his argument for the appellees (157 U. S., 525-6).

It is submitted that the requirement that indirect taxes shall be uniform throughout the United States can have no practical meaning unless it includes uniformity as between the persons and subjects of taxation within the class. Not being according to the rule of population, as direct taxes are required to be apportioned, the uniformity must be according to the amount, or value or character of the property, or of the things taxed or there would be no uniformity.

The expression "territorial uniformity," for which the counsel for the government contended in the *Income Tax Cases*, would mean nothing without a classification based upon some real and reasonable distinction. It certainly does not mean that the indirect taxes levied upon each state, or upon each square mile, or upon each square acre, shall be uniform, one with the other, according to territory. Indirect taxes are not laid in any way according to territory. Used in any other sense than this the term "territorial or geographical uniformity" means what we contend for; that is, that in every part of the United States the same thing shall pay the same tax. But the question of uniformity here involved is a question of territorial uniformity in the only proper sense of that term. The tax is upon sales made at

certain places. It is the *place* where the sale is made which determines whether it comes within the tax or not. Now, to classify merely according to the place would clearly violate the requirement of territorial or geographical uniformity. Then, if the places the sales at which are held to be within the Act, are not properly distinguishable, with respect to a proper basis for classification, from other places the sales at which are conceded not to be within the Act, then plainly the requirement of territorial uniformity, in any proper sense of that term, is violated. In other words, the Government is driven to abandon its contention in the *Income Tax Cases* as to the meaning of the words of the constitution, "uniform throughout the United States." This Act would violate the territorial uniformity as there contended for. That the territorial uniformity for which counsel for the Government in the *Income Tax Cases* contended as the true construction of the the words "uniform throughout the United States," is violated, if the thing taxed,—whether a sale or other transaction or act,—is not taxed uniformly at all places, is laid down in the *Head Money Cases*, 112 U. S. 580. In other words, if the essential distinction between the thing taxed and the thing untaxed,—whether the subject of the tax be a sale or other transaction or act or thing, because the sale or other transaction or act or thing

is situated or takes place at the one place and not at another, then there is a plain violation of the requirement of territorial uniformity. And that is this case, if the tax is held to apply to sales of live stock like that here shown.

There is, we submit, a plain violation of the requirement of territorial uniformity in taxing a sale of cattle made by the owner or his agent in the pens of the Union Stock Yards at Chicago, while a sale of the same cattle by the same owner or his agent at the cattle pens at the railway station at Hayes City or Dodge City, Kansas, or at the pens or yard of the owner on his farm or ranch, or elsewhere is untaxed. It cannot be denied that the principle of territorial uniformity, for which counsel for the Government have so much contended in the *Income Tax Cases*, would be clearly violated by this Act which makes the place of sale the test of the classification. And while Mr. WHITNEY and Mr. Attorney General OLNEY in their argument for the United States in the *Income Tax Cases* contended that the words "uniform throughout the United States" required a geographical or territorial uniformity (157 U. S., 474-505), Mr. Solicitor General RICHARDS in the *Chicago Board of Trade Cases* seems to have given up this idea and conceded the contention of counsel for appellant Nicol, that the uniformity required applies as between

individuals as well as localities, and "is a uniformity within the created class." (Brief, p. 26.) Counsel finds that to justify this tax on sales upon the floor of exchanges and boards of trade if territorial uniformity were the test his case would fail. And he is compelled to appeal to a supposed "uniformity within a created class." But, plainly, the uniformity required is territorial and individual, in the sense that the same thing at every place and as to every person throughout the United States must be taxed alike.

Mr. Justice MILLER in his lectures on the Constitution, pp. 240-241, as quoted in the opinion of Mr. Justice FIELD in the *Income Tax Cases* 157 U. S., 594, said of taxes levied by Congress, that "the tax must be uniform upon the particular article," and that the uniformity required in State constitutions "*must refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people and at all times.*" And the same distinguished jurist, speaking for this court, in his opinion in the *Head Money Cases*, 112 U. S., 580, 594, said that "the tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

In *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337, Mr. Justice MATTHEWS, in the opinion of the court, says of the classification of subjects for taxation, that "the rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

In *Magoun v. Illinois Trust and Savings Bank*, 171 U. S., 283, 293, the court, by Mr. Justice McKENNA, says that the equal protection of the laws requires "that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." And this is taken from the opinion by Mr. Justice FIELD in *Hayes v. Missouri*, 120 U. S., 68, 71, who further quotes from the opinion in *Barbier v. Connolly*, 113 U. S., 27, 32, that "class legislation, discriminating against some and favoring others, is prohibited."

In *Bell's Gap Railroad Co., v. Pennsylvania*, 134 U. S., 232-237, Mr. Justice BRADLEY, speaking for the Court, says that the classification of subjects for taxation, "so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the

State in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,"

In *Gulf, Colorado & Santa Fe Ry. vs. Ellis*, 165 U. S. 150, Mr. Justice BREWER speaking for the Court, said that "such classification cannot be made arbitrarily," and that it "must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

It is submitted that if this Act is to be construed as it was construed by the District Court, so as to include within the subjects taxed the sale of cattle here in question, then the Act would violate the provisions of the Constitution requiring uniformity and the equal protection of the laws.

IV.

The phrase "or other similar place" in Schedule A of the War Revenue Act, if open to the interpretation given by the court below, is void for uncertainty and indefiniteness.

The phrase occurs in the second paragraph of Schedule A of the War Revenue Act. It is printed

in full on p. 25 of the Transcript. The immediate connection is as follows:

“Upon each sale, agreement of sale, or agreement to sell, any product or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof, in excess of one hundred dollars, one cent.”

Then follow the provisions for the memorandum, and its contents, and finally the provision that any person liable to pay the tax, who makes such a sale without stamp, shall be guilty of a misdemeanor, and imposing punishment therefor at a fine of not less than \$500.00 nor more than \$1,000.00 or imprisonment not more than six months, or both.

The information charged in each count “a sale at a certain exchange and place similar to an exchange and board of trade” (Tr. pp. 2 and 3); and the instruction of the court to the jury confined the case to the selling at a “similar place.” (Tr. p. 46.)

The instruction was as follows:

“I will instruct you that it is your duty—that the evidence in this case shows that this defendant has violated the law; * * * that the stock yards is a place similar to an exchange, and transactions on the stock yards must be ev-

idenced by a memorandum in writing * * *
 The failure to stamp it is a violation of the law
 * * * I instruct you, gentlemen of the jury,
 to return a verdict of guilty."

The eleventh assignment of error specifically charges that this provision and phrase is void for uncertainty; that the words "or other similar place" in said Act contained, do not define or describe any place or kind of place with sufficient certainty to create any offense or impose any obligation.

This is reiterated in the specification of errors at the beginning of this brief. (Specification number thirteen.)

A consideration of this phrase, as a part of the definition of other crimes of place, will make its insufficiency apparent.

What would be said of a statute defining burglary as the breaking and entering with malicious intent, etc., of a mansion house *or other similar place?*

What would be said of a statute which forbade the disturbing of a school *or other similar place?*

What would be said of a banking statute which required the deposit of public securities by the banker or keeper of the place before opening a bank *or other similar place?*

What would be said of a statute which required saloons to be licensed, and forbade the keeping of a saloon *or other similar place* without license?

What would be said of an ordinance which, in order to raise municipal revenue, required every restaurant *or other similar place* to pay a special tax, and subjected to fine and imprisonment every person keeping such restaurant *or other similar place* without paying the tax?

What, indeed, would be said of an ordinance of the city of Chicago which required every exchange, board of trade, *or other similar place*, to pay a license fee and punished the keeping, unlicensed, of any such exchange, board of trade, *or other similar place*?

We submit that these questions suggest the common answer that the provision "or other similar place" is void for uncertainty: and that it must be so held in the War Revenue Act.

Without disrespect to the eminent statesmen who drafted the Act to provide a revenue for war expenditures, we cannot shut our eyes to the fact that the Act itself, like the necessity which called for it, was the result of a very sudden emergency. The Act was prepared with great haste. Seldom has so important and far-reaching a measure been passed with greater speed, and with less of that preliminary debate which resolves doubts and eliminates obscuri-

ties and leads to certainty. And again, without disrespect to the eminent statesmen who drafted the measure, we cannot avoid remembering the reflection of Lord COKE "upon Acts of Parliament overladen with provisos and additions, and many times *on a sudden penned* or corrected by men of none or very little judgment in law." (2 Coke, Preface.) And while we disclaim adopting that expression as a reflection upon the judgment of our legislators, we respectfully submit that the Act in question is one of those "on a sudden penned," and therefore embarrassed by the obscurity and indefiniteness which makes the phrase in question void.

Chancellor KENT defines statute law as "the express written will of the legislature rendered authentic by certain prescribed forms and solemnities." (1 Comm. Lect. XX ; 14 Ed., *p. 447). And he significantly adds: "It is a principle in the English law that an Act of Parliament *delivered in clear and intelligible terms*, cannot be questioned or its authority controlled in any court of justice."

In *Hughes' Case*, 1 Bland's Chancery, 46, the learned chancellor, in construing a statute regulating partition proceedings, said:

"Even upon English authority, a court of justice cannot be permitted in any case to legislate; (*Wcale v. West Middlesex Wa. Comp.*,

1 Jac. & Wal. 371; *The Bank of Columbia v. Ross*, 4 H. & M'H. 456); and because, by the constitution of our Republic, (Dec. Rights, art. 6) the three departments have been directed to be kept forever separate, the judiciary has been expressly excluded from every species of legislation; and it is precluded from supplying any omissions of the legislature, however obvious or necessary it may be for attaining the object in view."

It is of the essence of a statute that it be an express command by the legislature, and that it be delivered "in clear and intelligible terms." And these requisites are the more important in cases of statutes defining crimes and denouncing penalties for their violation.

State v. Boon, 1 Tayl. (3 N. Car.), 246.

In that case (A. D. 1801) the defendant, it is said in the report, "was indicted on the third section of the Act passed in 1791, the words of which are 'that if any person shall be hereafter guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a freeman, any law, usage or custom to the contrary notwithstanding.'"

The whole bench held that the statute was too uncertain to sustain a conviction and arrested judgment. HALL, J. said:

“In case the person had killed a free man, what punishment would the law have inflicted upon him? Before this question can be solved another must be asked; because upon that, the solution of the first depends. What sort of a killing was it? or what circumstances of aggravation or mitigation attended it? Did the act bespeak such depravity of heart as would stamp it with the name of murder? Or were they such as justified it? If of the former sort, capital punishment should be inflicted upon the author of it: if of the latter sort, he is guiltless. That to which the legislature referred us for the purpose of ascertaining the punishment, proper to be inflicted is, in itself, so doubtful and uncertain, that I think no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases, ought never to be allowed a judge.”

The history of such an abortive piece of legislation is thus recapitulated by Mr. DWARRIS:

“By the 14 Geo. 2, c. 1, persons who should steal sheep, or any other cattle, were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, ‘any other cattle,’ yet they were looked upon as too loose to create a capital offense. By the 15 Geo. 2, c. 34, the legislature declared that it was doubtful to what sort of cattle the former Act extended besides sheep, and enacted and declared that the Act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and

lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the judges felt that they could not apply the statute to any other cattle but sheep. The legislature by the last Act says that it was not to be extended to horses, pigs or goats, although all these are cattle (3 Bing., 581). Yet horses are cattle within the Black Act (2 W. Bl., 723), and bulls are not cattle within 3 Geo. 4, c. 71 (*Ex parte Hill*, 3 C. & P., 225)."

Potter's Dwaris on Statutes, Ed. of 1871, p. 248.

So in *Drake v. Drake*, 4 Dev. (15 N. Car.), 114, the Supreme Court, RUFFIN C. J., said:

"Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

In that case the court held that a statute passed for the purpose of legitimating a natural son of the decedent had no effect except to change his name. The probable purpose was not expressed with sufficient definiteness to justify the court in taking a part of the decedent's property away from other persons who were heirs.

So in *State v. Partlow*, 91 N. Car., 550; s. c., 49 Am. Rep, 652, (A. D. 1884), a statute prohibited the sale of spirituous liquors within three miles of Mt. Zion Church in Gaston County. There were two churches of that name in that county. It was held that the statute was inoperative and void for uncertainty. MERRIMON J., said:

“But a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one. The court may not allow ‘conjectural interpretation to usurp the place of judicial exposition.’ There must be a competent and efficient expression of the legislative will. * * * *

“When the statute intends to refer to and embrace within its provisions one or more of a multitude of things of the same kind, or one or more persons of many of the same name, it must do so in some way or manner, in terms, or by reasonable implication, or appropriate descriptive words, to designate what things or persons are intended by it, else how can the court or a ministerial officer decide what things or persons are meant? A member of the legislature might say one thing or person was meant; another might

say another thing or person was meant; a third might say yet another thing or person was meant; and thus the legislative will might entirely fail. The statute must speak. The legislative expression of its purpose and will must prevail; and if this does not appear with such a degree of certainty as that the court can learn what it is, the statute cannot operate."

The Supreme Court of Pennsylvania announced the same rule in *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg., p. 173, at 177. There the State owned certain shares in a bank, and the statute aimed to provide a method of voting the shares of the State. The opinion of Chief Justice GIBSON quotes the statute and points out its uncertainty. He says:

"We have seldom, if ever, found the language of legislation so devoid of certainty as in the provision before us. * * * What, then, is to be done? It would be easy, by an imaginary distribution, to place the State's shares in the hands of individuals, in such proportions as would produce any number of votes, even by an application of the scale (prescribed by the Charter, not the Act in question), which might be requisite to give either side a preponderance; but it certainly was not intended to give this court, as the interpreter of the proviso in the last resort, a power to control the event; and without assuming such a power, we are unable to arrive at any satisfactory conclusion. We are constrained, therefore, to say that no

valid election has been held, and that none can be held without further legislation."

So in *Leavitt v. Lovering*, 64 N. H., 607, 15 Atlantic Reporter, 414, the court had to deal with a statute prescribing the effect of assignments for the benefit of creditors upon attachments and conveyances. The particular provision involving the principle now under discussion, and the application of the principle to that Act, are thus stated by Mr. Justice CARPENTER:

"Whenever an assignment to the judge of probate is made as provided by Section 1 of this Act, all attachments shall be void, except such as have been made three months previous to such assignment, and all payments, pledges, mortgages, conveyances, sales and transfers made within three months next before said assignment, and after the passage of this Act, *and before the 1st. of September next*, and also all payments, pledges, mortgages, conveyances, sales and transfers, whenever made, if fraudulent as to creditors, shall be void, and the assignee may recover and hold the property attached, mortgaged, conveyed, sold or transferred, as aforesaid, disencumbered of all such liens or claims. Laws, 1885, c. 85, 89. The unmistakable intent of the statute is to make void all payments, pledges, etc., made after the passage of the Act, and within three months next before the debtor's assignment. No effect consistent with this intent can be given to

the words, 'and before the first of September next,' and they must be rejected as without meaning."

So in *Ward v. Ward*, 37 Tex. 389, the legislature had passed a statute, November 1st, 1861, which authorized appeals from interlocutory judgments, orders, or decrees, thereafter rendered by the District Courts, and required that such appeals "be regulated by the law regulating appeals from final judgments in the District Court, so far as the same may be applicable thereto." It was held that this statute was nugatory and void, for the reason that the statutes regulating appeals from final judgments were entirely inapplicable to appeals from interlocutory judgments.

The Court, WALKER, J., said:

"Is the law one which, in its present condition, can be enforced? The first section gives the right of appeal to the Supreme Court from any interlocutory order, judgment or decree, entered in the District Court. The second section provides that appeals thus authorized shall be regulated as appeals from final judgments, so far as the law may be applicable. If, then, it is found that there is no law applicable which regulates appeals from final judgments, we are forced to the conclusion that the Act of November 1st, 1871, is nugatory and void. * * *

"This is a matter of too great public im-

portance to be left to any uncertainty, or even to admit the courts to fix upon any rule of practice that could govern; and it is very doubtful whether any bond, where there is none provided for applicable to the case, could be made available. * * * * *

"We hesitate, to consider well any judgment of ours which declares unconstitutional or void an Act of the Legislature, paying due deference to the learning and wisdom of that branch of the government. But when we find ourselves totally unable to administer a law by reason of its uncertainty or ambiguity, or believe it to be unconstitutional, we shall not hesitate to discharge the duty which the law devolves upon us.

"We do not mean to say, by any means, that the Act of November 1st, 1871, is unconstitutional, but we do say that it is nugatory and void for want of some adequate provision in the law to carry out its execution."

In 1845, in *Green v. Wood*, 7 Adol. & El., Q. B. N. S. 178, the Court of Queen's Bench had occasion to construe a section of the Bankrupt Act then in force (St. 3, Geo. IV, C. 39), which provided that certain judgments by confession should be void, "unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed *or* execution *issued* on such warrant of attorney within the

same period. The court applied the rule which we submit should be applied here. The following opinions were delivered:

LORD DENMAN, C. J. We are bound to give to the words of the Legislature all possible meaning which is consistent with the clear language used. But, if we find language used which is incapable of a meaning, we cannot supply one. It is true that we have here words which, as they stand, are useless; a circumstance, perhaps, not altogether unprecedented. But, to give an effectual meaning, we must alter, not only "or" into "and," but "issued" into "levied." It is extremely probable that this would express what the Legislature meant. But we cannot supply it. Those who used the words thought that they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize.

PATTESON, J. There is great difficulty in construing this Act. Look at sect. 3. A *cognovit actionem* is made void against the assignee unless filed within twenty-one days: yet afterwards a *cognovit* and warrant of attorney are treated as if they were on the same footing. It is clear to my mind that some mistake has occurred in drawing this Act, and that we cannot hope to give a meaning to the whole. If "or" in sect. 2 is not altered to "and," there is no meaning, for there cannot be execu-

tion without a judgment. We can give no meaning to the words "execution issued." If we do read "and" (which might possibly be justifiable if we could get a reasonable meaning by so doing), that will not be enough; for it is ridiculous to suppose that the Legislature contemplated an execution issued *pro forma*. And so we should be bound to say that "issuing" means "levying"; which, indeed, Mr. HAYWARD (counsel for plaintiffs) does contend for. I do not think we should be justified in doing so. It is best to say that the words have no meaning at all.

WILLIAMS, J. There is abundant authority for construing "or" to mean "and," if that would supply a meaning. But then comes the pressure of the difficulty. For it is admitted that this is not enough unless we go further, and say that "issued" means "levied." That is so violent a change that it amounts to framing a new section, instead of interpreting what we find. We are not authorized to do this. It is much safer to say that the words have really no meaning.

WIGHTMAN, J. How the mistake has arisen, it is not for us to say. It is admitted that, to give the effect required, we must do more than substitute "and" for "or," and must go on to hold that "issuing" means "levying." There is also another inaccuracy. Sect. 2 speaks of execution issuing "on such warrant of attorney"; here we have to add the words "on a judgment" before "on such warrant of attor-

ney," to give any meaning at all. All this would amount, in truth, to the introduction of a new clause."

So in *Doe dem. Darenish v. Moffatt*, 15 Adol. & El., Q. B. N. s. 256 Lord CAMPBELL C. J., refers to the 4th section of Stat. 7 and 8 Vict. C. 76, as "ungrammatical and insensible."

So in *McConrill v. Mayor &c. of Jersey City*, 39 N. J., Law, page 38:

"The Board of Alderman of Jersey City, acting under the charter of 1871, (*Pumph. L.*, 1871, p. 1094), passed the following ordinance: 'Sec. 1. No person shall drive, or cause to be driven, any drove or droves of horned cattle, (except milch cows), through any of the streets, avenues, &c., of Jersey City. Sec. 2. That any person, &c., that shall violate the provisions of this ordinance, shall, for every such offense, forfeit and pay the sum not exceeding \$50.' Sec. 24, pl. 5, of the charter, authorized the board to pass ordinances to regulate and control the driving of cattle, &c., through the streets, &c., of the city. The court held that it was bad for vagueness and uncertainty in the thing forbidden."

Mr. Justice WOODHULL said:

"2. The next question is, does the ordinance sufficiently define the offence which it was designed to prohibit?

"It has been well said that a by-law ought to be expressed in such a manner as that its mean-

ing may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate. *Grant on Corp.*, 86. The same thing may be said of all laws, but the remark has a special significance as applied to such as are penal in their character.

“‘It is impossible,’ says Mr. DWARRIS, ‘to dissent from the doctrine of Lord COKE, that Acts of Parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.’ *Duray. on Stat.* 652.

“‘Brought to the test of these principles, the ordinance in question must, as it seems to me, be pronounced bad for vagueness and uncertainty in respect to the thing prohibited.

“‘It simply forbids the driving of any *drove* or *drowes* of horned cattle, etc. Assuming the ordinance to be merely for the regulation and restraint, within reasonable limits, and not for the entire prohibition of the driving, etc., what are the limits within which such cattle may be driven through Jersey City?

“‘No person shall drive any *drove* or *drowes*, etc., but how many cattle may be driven, etc., without incurring the prescribed penalty? If more than one at one time, how many more? A *drove* is defined by Webster to be ‘a collection of cattle driven; a number of animals, as oxen, etc., driven in a body.’ ‘We speak,’ he says, ‘of a herd of cattle, and a flock of sheep, when a number is collected; but properly a *drove* is a herd or flock *driven*.’

“‘It cannot escape observation that the very words here used to describe or define the mean-

ing of drove, namely, *collection, number, body, herd, flock*, are all of them essentially indeterminate, each one, as well as the word they are employed to explain, merely conveying the idea of an aggregation of units, without furnishing the slightest hint in answer to the question, how many."

So in *Johnson v. State*, 100 Ala., 32, s. c., 14 Southern Reporter, 629, the court held that a statute, providing that one who shall take away with intent to steal, or hold for reward, a dog registered under that act, "shall be punished on conviction as in other cases of larceny," was void for uncertainty, since it did not make dogs property, nor give them any value, nor state whether the punishment of grand or petit larceny should be imposed.

Tested by the requirement of clearness and freedom from uncertainty or indefiniteness, we submit that the phrase "or other similar place" in the War Revenue Act is void on principle; that the Act being a penal Act, and this case a proceeding to enforce the penalty, it should be pronounced void, as were the statutes questioned in the authorities here cited.

V.

If this tax applies to the sale of cattle here in question, then the tax is a direct tax and violates the rule of apportionment.

The question of what is a direct or indirect tax was argued with such thoroughness and consummate ability in the *Income Tax Cases*, and was so recently the subject of such thorough consideration by this Court, that we shall not inflict any further discussion of that question upon this Court. It is the settled law of this Court, as laid down in that case, that taxes on the rents or income of real estate are direct taxes, and that taxes on personal property, or on the income of personal property, are direct taxes (158 U. S., 637).

It is also laid down in a number of decisions of this Court that a tax upon the sale of merchandise is a tax upon the merchandise itself. *Brown v. Maryland*, 12 Wheaton, 419, 444; *Dobbins v. Commissioners*, 16 Peters, 435; *Almy v. California*, 24 How., 169; *Welton v. State of Missouri*, 91 U. S., 275; *Cook v. Pennsylvania*, 97 U. S., 566; *Pollock v. Farmers Loan & Trust Company*, 157 U. S., 581-2.

Mr. Solicitor General Richards, in his argument in the *Nicol Case*, contends that this tax is a tax upon the sale. Therefore it is a tax upon the property sold.

It is clear that this tax, as applied to the sale of live stock, falls directly upon the owner of the live stock making the sale or for whom it is made. The tax applies as much to the sale whether made by himself or made by others for him. Some of the authorities make the test, as to whether the tax is a direct or an indirect tax, the question whether taxes are paid by the owner without being recompensed by the consumer; or whether the tax falls on the use and not the possession; or whether the tax falls on the expenses or the consumption. (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 568-71.) But under these tests the tax here would seem to be a direct tax, as it falls directly upon the property and is paid by the owner making the sale.

CONCLUSION.

It is submitted that under a proper construction of said Act the sale of cattle in question and other like sales at the Union Stock Yards are not sales "at any exchange or board of trade, or other similar place"; and that the construction placed upon the Act by the District Court is erroneous; and that the as construed by that court, and as applied to the sale in

question, would be, and if that construction is correct, is in violation of the Constitution, and void; and that the same, if otherwise constitutional, is void for indefiniteness.

JOHN S. MILLER,

MERRITT STARR,

For Plaintiff in Error.

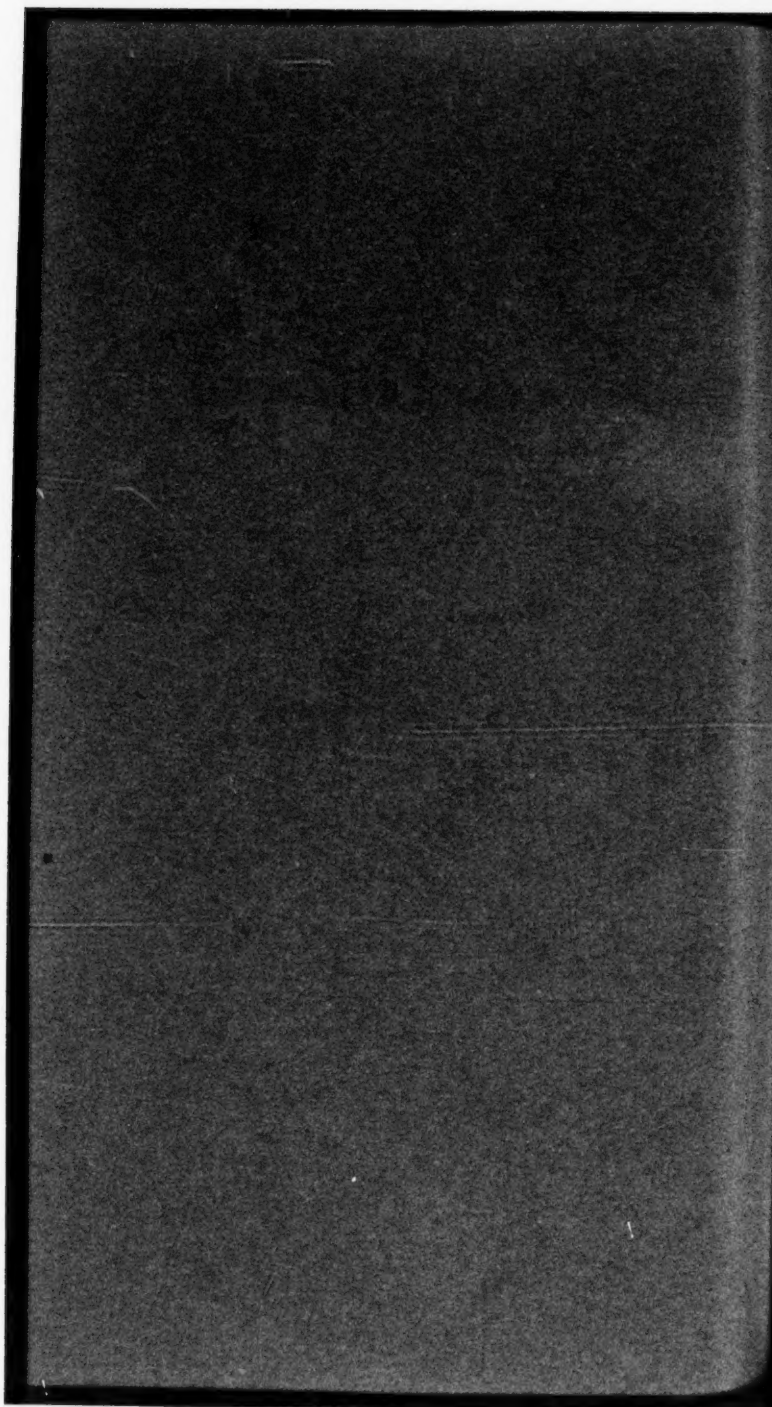


P. 100
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CHURCH OF THE HOLY TRINITY

THE TRINITY CHURCH

THE TRINITY CHURCH



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

CHARLES H. INGWERSEN, PLAINTIFF in error, v. THE UNITED STATES.	} No. 636.
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BRIEF FOR THE UNITED STATES.

STATEMENT.

QUESTION.

The questions raised are the constitutionality and construction of that provision of the act of June 13, 1898 (30 Stats., 448), known as the "War Revenue Act," which levies a tax "upon each sale, agreement of sale, or agreement to sell, any produce or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery."

On October 14, 1898, Charles H. Ingwersen, as agent of Ingwersen Brothers & Smith, the plaintiff in error, a corporation engaged in the live-stock commission business, made a sale of 19 head of cattle, weighing 22,280 pounds, at \$5.25 per hundred pounds, for \$1,169.70, the same being cattle consigned to Ingwersen Brothers & Smith for sale upon commission, to one David Moog, at the Union Stock Yards, of Chicago, without affixing to the written memorandum of the sale delivered by him to the buyer any revenue stamp, as required by the act mentioned.

For this an information was filed against him in the district court for the northern district of Illinois, and he was tried and convicted before Judge Grosceup and a jury. To reverse the judgment of conviction he has prosecuted error to this court.

He contends :

1. The provision of the War Revenue Act quoted is unconstitutional.

2. If valid, it does not apply to transactions at the Union Stock Yards, of Chicago, because these stock yards do not constitute "an exchange, or board of trade, or other similar place."

Having in the Chicago Board of Trade cases (*Nicol v. United States Marshal*, No. 435, and *Ex parte Nichols*, No. 4, Original) discussed by brief and orally the constitutionality of the taxing law in question, I shall confine myself in this brief to a consideration of the question as to whether the Union Stock Yards, of Chicago, is "an exchange, or board of trade, or other similar place."

ARGUMENT.

Attached to and made part of the information, as Exhibit A, is a description of the Union Stock Yards (Record, p. 4), and as Exhibit B, the act of incorporation and by-laws of the Union Stock Yard and Transit Company, which controls the Union Stock Yards (Record, pp. 5 to 13).

In addition to these documents, the record contains the testimony of W. B. Ingwersen, who testifies to the making of the sale without affixing a revenue stamp to the memorandum (Record, pp. 29 to 33), and the testimony of C. W. Baker, engaged in the live-stock business at the Union Stock Yards, who describes the Union Stock Yards and the method of dealing there (Record, pp. 33 to 44). I submit that a careful reading and consideration of this part of the record will satisfy the court that these yards constitute an exchange or other similar place within the meaning of the War Revenue Act.

Exhibit A, attached to the information (Record, p. 4), contains the following description of the Union Stock Yards:

The Union Stock Yards described in this information, at the respective times therein mentioned, and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street and Forty-seventh street and Halsted street and Ashland avenue, in the city of Chicago, in the county of Cook and State of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alley gates

lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the city of Chicago, extend into the yards, over which cattle, hogs, and other live stock received at or shipped from the Union Stock Yards are carried. Upon the arrival of cattle, hogs, or other live stock at the Union Stock Yards consigned to the commission merchant at the Union Stock Yards, such cattle, hogs, or other live stock are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are there cared for, fed, and watered by such owner or consignee. Any person is at liberty to send, take, or to receive cattle, hogs, or other live stock into the Union Stock Yards and there place, or have the same placed in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell. Any person has access to the pens containing cattle, hogs, or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs, and other live stock in the yards are at private sale. Commission merchants having cattle, hogs, or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found take him to the pens in which such live stock is contained, and there exhibit such live stock; and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs, and sheep in the yards are by weight, and upon a sale thereof being made such live stock are taken by the

owner or commission merchant having charge thereof from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company and in charge of the scale in which said live stock are weighed, and the weight of such live stock is thereby determined as the weight for which the purchaser pays upon his purchase, and the amount of the purchase price at the price per pound or per hundred pounds fixed in such sale is thereby determined.

It is to be observed that the stock yards cover 335 acres in Chicago, 200 acres of which are covered by 5,000 pens from 8 feet square to 50 feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, connecting with all the lines of railway running into and out of Chicago, extend into the yards. Upon the arrival of cattle at the yards consigned to the commission merchant, the cattle are placed in the pens and there cared for by the owner or consignee. Any person may send cattle into the stock yards and have them placed in pens, and there sell them. Any person has access to the pens for the purpose of buying the cattle. Sales are made at private sale. Commission merchants having cattle in the yards seek a buyer, and when one is found take him to the pens and there exhibit the cattle, and sell them. Sales in the yards are by weight, the cattle being taken by the commission merchant to the yard scales, where they are weighed by the yard weighmaster, and this weight is used to compute the purchase price.

In other words, here is a place in Chicago, provided with pens, connected by its own railroad with all the railway lines both from the West and East that run into Chicago, where live stock are received, cared for, sold and delivered. Here the cattle from the West are placed before the buyer from the East. It is a place where the sellers and the buyers of live stock are brought face to face. The place itself, this live-stock exchange or dealing ground for buyers and sellers, is controlled by the Union Stock Yard and Transit Company, the constitution, or act of incorporation, and by-laws of which appear in the Record, pp. 5 to 13.

The act of incorporation of the Union Stock Yard and Transit Company, approved February 13, 1865, creates a corporation and gives it power—

To locate, construct, and maintain upon the land purchased for such purpose, in convenient proximity to the southerly limits of the city of Chicago, and west of Wallace street, as the same would be extended in a straight line south from said city limits, all the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches, and turn-outs, aqueducts, for the reception, safe-keeping, feeding and watering, and for the weighing, delivery, and transfer of cattle and live stock of every description and also dead and undressed animals that may be at, or passing through or near, the city of Chicago, and for the accommodation of the business of a general union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same, if deemed expedient, for the convenience of drovers, dealers, and the public doing business at the said yards (section 2).

In the same section the company is given power "to make advances of money upon such cattle and live stock, for freight or other purposes, as may become expedient."

The company is also authorized to construct a railway, with one or more tracks, and with the necessary side tracks and switches, from its stock yards, so as to connect the same with the tracks of all the railroads which terminate in Chicago, and to transport thereon between said railroads and cattle yards all cattle and live stock and persons accompanying the same to and from said yards. Power to fix the rates for freight and property transported is given, with this important proviso, recognizing the quasi public character of the use to which the projected yards with transportation facilities were to be put :

Provided all fees and charges for freights, hotel bills, feeding, carrying, and everything done by reason of the powers herein given shall be subject to any general law that may be passed by the legislature of this State in reference to stock yards of railroads. (Section 3.)

The subsequent sections give the company the right to accept grants and donations (section 4), fixes its capital stock at \$1,000,000 (section 5), vests the corporate powers in a board of directors (section 6), provides for the election of this board (section 7), authorizes the adoption of by-laws (section 8), provides for the crossing of streams and roads (section 9), empowers the company to borrow money (section 10), and provides for an equal treatment of all connecting railroads (section 11).

There are no provisions in the by-laws requiring special notice.

The testimony of C. W. Baker, engaged in the live-stock business at the Union Stock Yards, is of special interest. I call particular attention to that portion printed on pages 42 to 43 of the Record, as follows:

The COURT. What number of cattle are brought into these stock yards every year?

The WITNESS. Two and one-half million cattle and 8,000,000 hogs last year, I think.

The COURT. What proportion of the production of this western country is that?

The WITNESS. Well, I should be pleased to furnish the court some figures on the subject. I wouldn't want to answer it off hand.

The COURT. I mean only approximately.

The WITNESS (after computation). Oh, one-fifteenth.

The COURT. Is there any other yard where so many cattle and hogs are sold?

The WITNESS. No, sir.

The COURT. It is the largest in that respect in the country?

The WITNESS. The largest stock yards in the world; yes, sir.

The COURT. About how many commission merchants are there at the stock yards?

The WITNESS. One hundred and ten firms; each firm is composed of one or more.

The COURT. How are they quartered there?

The WITNESS. They rent offices from the Union Stock Yards and Transit Company, who have provided an exchange building, located in the center of the yards.

The COURT. They are all in one building?

The WITNESS. Yes, sir.

The COURT. What proportion of these animals that are brought in are bought by the commission men?

The WITNESS. A very small proportion; I should say probably 5 to 10 per cent. And in making that statement I wish to say that all the class, I think, that commission men buy are such as are known as stockers and feeders, which they purchase for their customers to take back into the country. In other words, a countryman will bring two loads of cattle to the stock yards to his commission man for sale, to handle. The countryman desiring to place more cattle on feed, he goes, in company with his commission man, to what are known as the stocker pens, feeder pens, and there buys some thin cattle and takes them back to his farm to feed them.

The COURT. Who buys the fat cattle?

The WITNESS. The Eastern buyers located at Chicago and the slaughterers.

The COURT. How are the Eastern buyers represented?

The WITNESS. They have their regular representatives here.

The COURT. Commission men?

The WITNESS. No, sir; they have——

The COURT. They have offices, too?

The WITNESS. Yes, sir.

The COURT. In the same building?

The WITNESS. Yes, sir.

The COURT. And they watch the shipments of the animals as they come in, and make their purchases?

The WITNESS. Yes, sir. The custom is, for a commission man who receives the live stock, if he is a judge of his business, when he receives 10 carloads of live stock he knows about what class of buyers will handle each class, and he goes himself with his buyer, takes him to certain pens till he gets a certain price.

The COURT. What proportion of these animals are shipped to commission men?

The WITNESS. Oh, practically all—practically all.

The COURT. The commission men who have their offices in that building?

The WITNESS. Yes, sir.

The COURT. Is it a rare thing for the owner to bring in his own shipment?

The WITNESS. He very frequently consigns his stock to himself, then turns it over to a commission man for sale. In some few isolated instances sells it himself.

The COURT. So that really those 110 commission firms who occupy offices out there buy up the cattle over the country and sell it to the Eastern buyer whose representative is there, and to the slaughter-houses?

The WITNESS. No; they receive it and sell it on commission.

The COURT. Yes; I mean they receive the cattle.

The WITNESS. Yes, sir.

The COURT. And sell it to those Eastern houses?

The WITNESS. Yes, sir.

The COURT. And to the slaughterers?

The WITNESS. Yes, sir.

The COURT. That practically constitutes their business at the yards?

The WITNESS. Yes, sir. Of course there is some speculation there, as there always is around such market centers.

The COURT. Well, I do not think of anything else myself.

From the uncontroverted testimony of this witness it appears that the Union Stock Yards of Chicago are the largest stock yards in the world. About 2,500,000 cattle and 8,000,000 hogs, about one-fifteenth of the produc-

tion of our Western country, are brought into these stock yards yearly. The business in the yards is practically transacted by the commission firms, the slaughterers, and the Eastern buyers. The stock yards company has provided an exchange building, located in the center of the yards. The commission firms (there are 110 of them) rent offices in the exchange building. Here also are located the representatives of the Eastern buyers. Practically all the cattle shipped to the yards are sold by the commission men. It is only in isolated instances that an owner sells his cattle himself. The cattle, except the stockers and feeders (which amount to 5 or 10 per cent of the cattle received and are bought by commission men for farmers and stock raisers to fatten), are sold to the Eastern buyers and to the slaughterers. The commission man who receives cattle knows about what buyers will handle each class of stock he receives; so he goes himself to the buyers and takes them to the pens until he disposes of the cattle. In short, 110 commission firms receive the enormous shipments of cattle at the Chicago Stock Yards and sell them to the slaughterers and Eastern buyers. This practically constitutes the business carried on at the yards.

The Union Stock Yards were constructed and are owned and operated by the Union Stock Yard and Transit Company, a corporation with a capital stock of \$1,000,000. The company has not only provided pens for receiving, caring for, and exhibiting the cattle, but railroad facilities for transporting them to and from the yards and an exchange building for the use of those who deal in the yards—sellers and buyers.

For these facilities the company fixes and collects the rates and charges.

To operate with advantage on the yards the commission men, who are the sellers, and the representatives of the Eastern houses, who are the buyers, have to rent offices in the exchange building, for which they must pay the company such rents as it may fix.

To get his cattle into the yard, which is the market, the owner, or the commission man to whom the cattle are consigned, must pay the company the freight or switching charges on its private railway, and after the cattle reach the yard must pay the charges for the use of the pens, and for their feed, these charges being covered, I understand, by the term "yardage." (Brief of plaintiff in error, p. 39.)

The facilities and privileges of the greatest live-stock market in the world are therefore not *free*, in the sense of being without cost, either to cattle owner or yard dealer. Each has to pay the company for the privilege. The privilege is paid for indirectly, but none the less paid for. The live stock are carried into the yard by the Stock Yard Company over its own railroad, and for this it charges what it sees fit. The stock when received in the yard must be put in pens and fed and watered, and for these facilities the Stock Yard Company charges what it thinks proper. The dealers in live stock on the yard, sellers and buyers, in order to do business with success, must have offices in the exchange building, so they can readily find one another, and for this accommodation the Stock Yard Company prescribe the rates.

So while it is true that anyone may send his cattle into

the yards and there sell them, it is not true that he can do so without paying for the privilege. He pays for the privilege of using the market by paying for the accommodations which go along with the market and really constitute it.

Moreover, it is to be borne in mind that *practically all* the cattle sold on the yards are shipped to commission men (Rec., p. 43), so it is apparent that to enjoy to the best advantage the privileges and facilities of this market the owner of the live stock must employ a broker and pay him a commission. The sale in the case before the court was made by a commission firm. (Rec., p. 3.)

We have therefore here a defined place, under control of one company, constituting the largest live-stock market in the world, provided with every facility and accommodation for dealing in live stock, where the business is practically all transacted by dealers—sellers and buyers, with offices in the yards, and it is insisted that this is not an exchange, nor a similar place. What is the essential feature of an exchange? Surely the bringing together, under circumstances convenient for business, of dealers in the particular commodity; the facility of a great market, where the man who has something to sell may find a buyer with the least trouble and make a sale under the best conditions. The law taxes sales at exchanges or similar places because of the privileges and facilities the seller enjoys there which are not enjoyed elsewhere.

The argument of counsel for the plaintiff in error proceeds on the theory that it is the privilege of dealing on an exchange where such privilege is confined to members

that is taxed, and that you can not have an exchange or similar place unless the dealing at the place is restricted to members. This is to look at the law from the broker's point of view. The tax is not one on the occupation of a stock or produce broker. There is a separate tax on that. This tax is one on the sale or agreement to sell at an exchange or similar place, whether made by the owner of the commodity or his agent or broker. The wording of the act itself shows the tax applies whether a broker is used or not, and therefore must apply to sales at places where it is not necessary to use brokers. The seller is the one liable for the tax, and the law provides :

And any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall—

make a sale or deliver the goods without complying with the law, shall be punished as provided in the act. The law is designedly made applicable not only to the agent or broker, but to the owner. So it applies and was intended to apply to places where the owner can make his own sale, as well as to those where an agent or broker acts for him.

It is only necessary that the sale be made at an exchange or similar place—at a place where the facilities and privileges enjoyed by the seller and the character and magnitude of the business done by the dealers segregate the sales made there from other sales and bring them within the class which Congress intended to reach by this act. Is there any reason for taxing sales on the Chicago Board of Trade which does not equally apply to sales at the Union Stock Yard?

Does not the latter furnish the live-stock man privileges and facilities equivalent in their way to what the former furnishes the grain man? Does not the magnitude of the transactions on the stock yard compare favorably, in point of taxability, with those on the board of trade? Where, then, is the distinction? Opposing counsel find it in the fact that the owner is allowed to sell at the stock yards. True he does not do so. He finds it to his advantage, in order to obtain the full benefit of the market, to employ one of the 110 commission firms who sell practically all the stock sold on that yard. But he might do so; he is not debarred from the yard, as he is from the board of trade, and for that reason the sale he makes ought not to be taxed, was not intended to be taxed. But he has all the advantage of selling at a place set apart and especially arranged for dealers in live stock—at the greatest live-stock market in the world—where the highest skill and enterprise, with unlimited means at its call, have devised and provided every conceivable convenience and facility for receiving, keeping, exhibiting, selling, and delivering live stock to the biggest and best buyers obtainable anywhere. Nowhere in the world are there collected as many responsible buyers of live stock as at this exchange.

Opposing counsel cites what I say in my brief in the Board of Trade Cases as showing I limit an exchange to a place where only members of an association can deal. I submit my language, when fairly read, conveys no such meaning. True, I said, "I think it sufficiently appears from what I have said that the seller on an exchange enjoys facilities or privileges which the out-

sider does not," but the "outsider" I had in mind was the one who sells elsewhere than at an exchange, and the "seller on an exchange" was the *actual seller*, whether a member or not, and whether operating individually or through a broker.

In enacting this law Congress intended to take toll on the great highways of commerce, in the great marts through which the products pass on their way from the producer to the consumer. The tax is an indirect one, falling on the movement or transfer of commodities, and the places selected for taking the toll is where this movement or transfer is compressed or confined within measurable limits, namely, at the Boards of Trade or exchanges, or similar places. To these places both sellers and buyers resort; through them flows the enormous current of commodities. Here the Government can, with least inconvenience, collect a contribution for its support. The Union Stock Yards is one of these places. The dealers in meat are just as able to bear this tax as the dealers in wheat. The law intends to reach all sales at exchanges, whatever the product sold. Different products require different exchanges. The Union Stock Yards is the sort of exchange dealers in live stock demand; otherwise Chicago would change it. The advantages the seller finds there are the best the world affords, and he ought to be willing to pay his slight contribution to the support of the Government, without whose protection this great exchange could hardly exist.

JOHN K. RICHARDS,

Solicitor-General.

JANUARY 17, 1899.

Syllabus.

NICOL *v.* AMES.

NO. 435. APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS.

In re NICHOLS.

NO. 4. ORIGINAL.

SKILLEN *v.* AMES.

NO. 625. APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS.

INGWERSEN *v.* UNITED STATES.

NO. 636. ERROR TO THE DISTRICT COURT FOR THE NORTHERN DIS-
TRICT OF ILLINOIS.

Nos. 435 and 4 Original argued, and Nos. 625 and 636 submitted, December 13, 1898. — Decided
April 3, 1899.

When an act of Congress is claimed to be unconstitutional, the presumption is in favor of its validity, and it is only when the question is free from any reasonable doubt that this court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest.

The tax authorized by the act of June 13, 1898, by the board of trade or exchanges upon the sale of property is not a direct tax, nor a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of the business, separate and apart from the business itself, and is a constitutional exercise of the powers of taxation granted to Congress.

A sale at an exchange forms a proper basis for a classification which excludes all sales made elsewhere from taxation.

The means actually adopted by Congress, in the act in question, do not illegally interfere with or obstruct the internal commerce of the States, and are not a restraint upon that commerce, so far as to render illegal the means adopted.

There is no difference, for the purposes of this decision, between the Union Stock Yards and an exchange or board of trade.

Statement of the Case.

These cases involve the validity and construction of some of the provisions of section 6, and a portion of schedule "A," therein referred to, of the act of Congress approved June 13, 1898, c. 448, 30 Stat., entitled "An act to provide ways and means to meet war expenditures, and for other purposes," commonly spoken of as the War Revenue Act. The cases come before the court in this way :

No. 435 is an appeal to this court from an order made by the Circuit Court of the United States for the Northern District of Illinois, discharging a writ of *habeas corpus* and remanding the petitioner to the custody of the marshal. The petition to the Circuit Court for the writ alleged that the petitioner Nicol had been convicted in the United States court for the Northern District of Illinois, upon an information duly filed charging him with selling, at the Chicago Board of Trade and at its rooms, two carloads of oats, "without then and there making and delivering to the buyer any bill, memorandum, agreement or other evidence of said sale, showing the date thereof, the name of the seller, the amount of the same and the matter or thing to which it referred, as required by the act of Congress," above mentioned. He was sentenced to pay a fine and to be imprisoned until paid. He refused to pay, and was taken into custody by the marshal. That part of the act referring to the making and delivering of a bill or memorandum, etc., the petitioner claimed was unconstitutional. The Circuit Court, after argument, held the law valid and the conviction legal.

No. 4 Original is an application to this court for leave to file a petition for a writ of *habeas corpus* to bring before the court the petitioner George R. Nichols, and for a rule requiring the marshal for the Northern District of Illinois, in whose custody the petitioner is, to show cause why the writ should not issue. The petition states that Nichols was convicted and sentenced, under the act of Congress above mentioned, upon an information filed in the District Court of the United States for the Northern District of Illinois, for selling at the Chicago Board of Trade, of which he was then a member, for immediate delivery to one Roloson, also a member of such board,

Statement of the Case.

ten tierces, or three thousand pounds of hams, then in Chicago, at a price named, amounting to \$195, and on the sale unlawfully making and delivering to Roloson a bill and memorandum of the sale showing the date thereof, the name of the seller, the amount of the same and the matters and things to which it referred, without having the proper stamps affixed to said bill or memorandum denoting the internal revenue accruing upon said sale, bill or memorandum, as required by law, but on the contrary unlawfully refusing and neglecting to affix any such stamps to said bill or memorandum. Upon the trial the jury rendered a verdict finding the petitioner guilty as charged in the information, and the court sentenced him to pay a fine of \$500 and to be committed to the county jail until such fine and costs should be paid. The petitioner refused to pay the fine and an order of commitment was made out and placed in the hands of the marshal, who arrested the petitioner and he is now in the custody of the marshal. The petitioner upon the trial claimed that the act in regard to the matters named in the information was unconstitutional, and therefore no offence was charged in the information; that the court had no jurisdiction to try him, and that his conviction and subsequent arrest and detention were wholly without jurisdiction. The petitioner gives as a reason for his application to this court for the writ of *habeas corpus* that one James Nicol (the appellant in No. 435) had been convicted of substantially the same offence in the District Court for the Northern District of Illinois, and that he had made application for a writ of *habeas corpus* to the Circuit Court held in that district, which court, after a hearing upon the writ, decided against Nicol and in favor of the constitutionality of the act of Congress herein questioned, and the petitioner herein alleges that it would be a vain act to apply for a writ of *habeas corpus* to the same Circuit Court which had already, after a hearing, decided the question in a way unfavorable to the claims of the petitioner herein.

No. 625 is also an appeal to this court from an order of the Circuit Court of the United States for the Northern District of Illinois, discharging a writ of *habeas corpus* and remand-

Counsel for Parties.

ing the petitioner Skillen to the custody of the marshal. The petitioner was convicted upon an information of the same nature as is above set forth in No. 435, excepting that the information in this case alleged that the contract was for future delivery of 5000 bushels of corn, and that Skillen unlawfully failed and refused to make and deliver to the buyer any bill or memorandum as required by the act. The petitioner was convicted upon a trial had upon such information, and the court imposed upon him a fine in the sum of \$500 besides costs, and directed that he should be committed to the county jail until such fine and costs were paid. The same proceedings were then taken as are set forth in No. 435.

No. 636 is a writ of error to the District Court of the United States for the Northern District of Illinois, to review a conviction of the plaintiff in error upon an information charging him with making a sale of certain cattle at the Union Stock Yards, Chicago, and delivering the same without making any written memorandum, etc., as required by the act of Congress. The information also charged in a second count a sale, at the same place, of certain live stock and a delivery of a memorandum of the kind mentioned in the act of Congress and a failure and refusal to affix the stamps as provided for in such act. Upon the trial a *nolle prosequi* was duly entered upon the first count. The plaintiff in error claims that the act of Congress is unconstitutional on the same grounds mentioned in the other cases, and sets up as a special and separate defence that a sale at the stock yards is not included in the act of Congress, as it is not an "exchange or board of trade or other similar place," within the meaning of that act.

Mr. Henry S. Robbins and *Mr. John G. Carlisle* for appellants in Nos. 625 and 435, and for petitioner in No. 4 Original.

Mr. John S. Miller and *Mr. Merritt Starr* for plaintiff in error in No. 636.

Mr. Solicitor General for appellee in Nos. 625 and 435, and for defendants in error in No. 636.

Opinion of the Court.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

These cases may be considered together, because they involve substantially the same question, only the last one includes, in addition, a question of construction as distinguished from a question of the validity of the statute.

That portion of the act which is involved is set forth in the margin.¹ 30 Stat. 448, 451, 458.

¹ ADHESIVE STAMPS.

SEC. 6. That on and after the first day of July, 1898, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SCHEDULE A. — STAMP TAXES. (30 Stat. 448-458.)

. . . Upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence of such sale, agreement of sale or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale or agreement to sell, deliver any such products or merchandise without a bill, memorandum or other evidence thereof, as herein required, or who shall deliver such bill, memorandum or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing

Opinion of the Court.

It is seen that the cases embrace the facts of a member of the board of trade of Chicago, selling for immediate delivery, products or merchandise: (a) without making a memorandum; (b) making a memorandum but omitting to put stamps on it; (c) making a sale for future delivery and failing to put stamps on the memorandum.

In the *Nicol case*, (No. 435,) the sale was by a citizen to a citizen of the State of Illinois.

The case of sales at the Union Stock Yards at Chicago is also included where a memorandum is delivered, but the vendor neglects and refuses to affix the stamps to the memorandum.

The objections to the validity of the act are, stated generally, that it is a direct tax, and is illegal because not apportioned as required by the Constitution. If an indirect tax, it is a stamp tax on documents not required to be made under state law in order to render the sale valid, and Congress has no power to require a written memorandum to be made of transactions within the State for the purpose of placing a stamp thereon. It is not a privilege tax within the meaning of that term, because there is no privilege other than that which every man has to transact his own business in his own house or in his own office under such regulations as he may choose to adopt, and such a choice cannot be in any fair use of the term a privilege which is subject to taxation.

These questions are involved in each case, while in the last one it is further objected that the sales at the stock yards are not included in the terms of the act, and evidence was adduced upon the trial as to the nature of the business conducted at the stock yards, and the manner in which it was performed. It will be adverted to hereafter when we come to a discussion of the meaning and proper construction of the act.

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been

provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

Opinion of the Court.

said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

This necessary authority is given to Congress by the Constitution. It has power from that instrument to lay and collect taxes, duties, imposts and excises, in order to pay the debts and provide for the common defence and general welfare, and the only constitutional restraint upon the power is that all duties, imposts and excises shall be uniform throughout the United States, and that no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration directed to be taken, and no tax or duty can be laid on articles exported from any State. (Constitution, article 1, sec. 8, and sec. 9, subdivisions 4 and 5.) As thus guarded, the whole power of taxation rests with Congress.

The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be

Opinion of the Court.

indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on.

Coming to a consideration of the objections raised to this statute it is well to first consider the nature of an exchange or board of trade, and then to inquire more in detail as to the validity of the act with reference to sales at such places. The Chicago board of trade may be taken as a type of the

Opinion of the Court.

others in existence throughout the country, because the same features exist in all of them, while the size and importance of the Chicago institution serve only to make such features more prominent and their effect more easily discernible. We say the same features exist in all of the exchanges or boards of trade because we have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country, and while we could not take notice without proof as to any particular constitution or by-law of a body of this description, yet we are not thereby cut off from knowledge of the general nature of those bodies and of the manner generally in which business therein is conducted.

It appears in this record that the Chicago board of trade is a voluntary association of individuals who meet together at a certain building owned by the association for the purpose of there transacting business. This particular board is incorporated under an act of the legislature of Illinois, though its corporate character does not, in our judgment, form a material consideration in the inquiry. The members of the association meet daily between certain business hours for the purpose of buying and selling flour, wheat, corn, oats and other articles of food products, and for the transaction of such other business as is incident thereto. Among its members are some whose business it is to purchase in the country or to receive on consignment from persons in the country some or all of the articles which are dealt in on the floor of the exchange, and there are other members whose business it is to buy such articles upon the exchange either for themselves or on commission, and to deliver or ship the same to consumers or distributors throughout the country and in Europe.

It is common knowledge that these exchanges encourage and promote honest and fair dealing among their members; that they provide penalties for the violation of their rules in that regard, and that contracts between members relating to business on the exchange have the advantage of the sanction provided by the exchange for such purposes. They furnish a

Opinion of the Court.

meeting place for those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Dealings among members so engaged tend to establish the market price of the articles they deal in, and that price is very apt to be the price for the same article when bought or sold outside. The price is arrived at by offers to sell on the one side and to purchase on the other until, by what has frequently been termed, the "higgling" of the market, a price is agreed upon and the sales are accomplished. In arriving at this price, of course the great law of the cost of production and also that of supply and demand enter into the problem, and it is upon a consideration of all matters regarded as material that the agreement to buy and sell is made. The prices thus fixed are usually followed when the transaction occurs outside, and the market price means really the exchange price. That an enormous amount of the business of the country which is engaged in the distribution of the commodities grown or produced therein is transacted and takes place through the medium of boards of trade or exchanges cannot be doubted. Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facilities or privileges, even though not granted by the Government or by a State, ought nevertheless to be recognized as existing facts and to be subject to the judgment of Congress as fit matters for taxation.

We will now examine the several objections that have been offered to this statute.

It may be stated, of course, that if the tax herein is a direct tax within the meaning of the Constitution, it is void, for there is no apportionment as required by that instrument.

It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown v. Maryland*, 12 Wheat. 419, down to those involving the validity of the income tax, 157 U. S. 429; 158 U. S. 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the

Opinion of the Court.

taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property or on the sale thereof, then these cases do not apply.

We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct. The tax laid in the same act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker, while in the other case the tax, although measured in amount by reference to the value of the thing sold, is in reality upon the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an excise. The amount of such a tax when imposed in a case like this may be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one. A tax on professional receipts was recognized by the present Chief Justice in delivering the opinion of the court on the first hearing of the *Income Tax case*, 157 U. S. 429, 579, as an excise or duty and

Opinion of the Court.

therefore indirect, while a tax on the income of personalty he thought might be regarded as direct. And upon the rehearing, 158 U. S. 601, it was distinctly held that the tax on personal property or on the income thereof was a direct tax. This tax is neither a tax on the personal property sold nor upon the income thereof, although its amount is measured by the value of the property that is sold at the exchange or board of trade.

It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax to some one else. This however assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale.

We do not see that any material difference exists when the sale is for future delivery. The thing agreed to be sold is the same, whether for immediate or future delivery, and the fact that the sale for future delivery may subsequently be carried out by the actual payment of the difference between the agreed and the market price at the time agreed upon for such delivery does not affect the case. The privilege used is the same whether for immediate or future delivery, and the same rule applies to both.

Passing these grounds of objection, it is urged that if this is an indirect tax, it is not uniform throughout the United States as required by the Constitution. Sales at an exchange or board of trade, it is said, are singled out for taxation under this act, although they differ in no substantial respect from sales at other places, and there is therefore no just ground for segregating or classifying such sales from those made elsewhere. A sale at an exchange or board of trade, it is claimed, is not a privilege or facility which can or justly ought to be taxed while all other sales at all other places are exempted from

Opinion of the Court.

taxation, and there is no reasonable ground therefore for the assertion that such a tax is uniform within the meaning of the Constitution. It is said not to be uniform because it is unequal, taxing sales at exchanges and exempting all other sales, while at the same time there is no natural basis for any distinction between such sales, the distinction made being purely arbitrary and unreasonable.

This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word "uniform" is to be understood in what has been termed its "geographical" sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax, we think this tax is valid within either meaning of the term. In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. If it were to be assumed that taxes upon corporate franchises or privileges may be imposed only by the authority that created them, it does not follow that no privilege or facility can be taxed which is not created by the government of a State or by Congress. In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should be created by the Government. The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, Colorado &c. Railway v. Ellis*, 165 U. S. 150-155; *Magon v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294. If the classification be proper and legal, then there is the requisite uniformity in that respect.

A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by Government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale

Opinion of the Court.

elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because, although the subject-matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might and probably would occupy a great deal of time in finding a customer, bringing him to the spot and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilities for accomplishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not.

In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who make sales of the same kind of things, whether at an exchange or elsewhere.

Another objection taken is that Congress taxes only those who make sales and not those who make purchases, and those who sell products or merchandise and not those who sell bonds, stocks, etc. These are discriminations, it is said, which do not follow the rule of uniformity, and hence render the tax void.

A purchase occurs whenever a sale is effected, and to say that a purchaser at an exchange sale must be taxed for the facilities made use of in making the purchase, or else that the tax on the seller is void, is simply to insist upon doubling the tax.

Opinion of the Court.

Nor is it necessary to tax the use of the privilege under all circumstances in order to render the tax valid upon its use in particular cases. We see no reason why it should be necessary to tax a privilege whenever it is used for any purpose, or else not to tax it at all. It is not in its nature indivisible. A tax upon the privilege when used for one purpose does not require for its validity that the same privilege should also be taxed when used for another and a totally distinct purpose. It may be the same privilege, but when it is used in different cases to accomplish sales of wholly different things, between which there is no relation whatever, one use may be taxed and the other not, and no rule of uniformity will thereby be violated.

It is also objected that there is no power in Congress to require a party selling personal property, in the course of commerce within the State, to make a written note or memorandum of the contract, and to punish him by fine and imprisonment for a failure to do so; if the State do not require a memorandum on a sale, Congress cannot in the exercise of the taxing power compel a citizen to make one in order that it may be taxed by the United States.

In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. The act does not assume to in any manner interfere with the laws of the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment. The statute does not render a sale void without the memorandum or stamp, which by the laws of the State would otherwise be valid. It does not assume to enact anything in opposition to the law of any State upon the subject of sales. It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it secures by proper penalties the making of

Opinion of the Court.

the memorandum. Instead of a memorandum, Congress might have required a sworn report with the proper amount of stamps thereon to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect.

The means actually adopted do not illegally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means for collecting the tax which would prove less troublesome or annoying to the taxpayer, can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has the power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

We come now to the special objection raised in the *case of Ingwersen*, No. 636, and which applies to this case alone.

The sales were made at the Union Stock Yards, and it is claimed the statute does not cover the case of sales there made, because it is not an exchange or board of trade or other similar place.

The facts upon which the question arises are found in the record, and it shows that the Union Stock Yard and Transit Company of Chicago is a corporation which was incorporated under the laws of the State of Illinois in 1865. Under that charter the company had power to maintain cattle yards for the reception and safekeeping, feeding, weighing and transfer of cattle and other matters connected therewith, which are set out in full in the charter. The character of the business and the manner in which it is conducted are fully set forth in the record, from which the following extract is taken :

"The Union Stock Yards described in this information, at the respective times therein mentioned and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street and Forty-seventh

Opinion of the Court.

street and Halstead street and Ashland avenue, in the city of Chicago, in the county of Cook and State of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the city of Chicago, extend into the yards, over which cattle, hogs and other live stock received at or shipped from the Union Stock Yards are carried. Upon the arrival of cattle, hogs or other live stock at the Union Stock Yards consigned to the commission merchant at the Union Stock Yards, such cattle, hogs or other live stock are placed by the owner or consignee thereof or his or its agents, in one or more of the pens, and are there cared for, fed and watered by such owner or consignee. Any person is at liberty to send, take or to receive cattle, hogs or other live stock into the Union Stock Yards, and there place or have the same placed in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell. Any person has access to the pens containing cattle, hogs or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs and other live stock in the yards are at private sale. Commission merchants having cattle, hogs or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found take him to the pens in which such live stock is contained, and there exhibit such live stock; and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs and sheep in the yards are by weight, and upon a sale thereof being made such live stock is taken by the owner or commission merchant having charge thereof from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Stock

Opinion of the Court.

Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company and in charge of the scale in which said live stock are weighed, and the weight of such live stock is thereby determined as the weight for which the purchaser pays upon his purchase, and the amount of the purchase price at the price per pound or per hundred pounds fixed in such sale is thereby determined."

The corporation has nothing to do with the selling or purchasing of stock of any kind. The market at the Union Stock Yards is unquestionably the largest in the country.

The plaintiff in error at these yards as agent for a corporation then carrying on the business of a live stock commission character and which was a dealer in live stock, sold to another as agent for the Eastman Company, also a corporation created for the purpose of dealing in live stock, a certain amount of merchandise for present delivery without affixing any stamp to the memorandum.

We cannot see any real distinction sufficient in substance to call for a different decision between the Union Stock Yards and an exchange or board of trade. We think it is a "similar place" within the meaning of the statute under consideration.

It is true that there are no sales or purchases of stock made by members of the stock yards company as such. Any one is accorded the right to bring his cattle to the stock yards upon payment of the regular fees and compliance with the regulations made by the company, and having brought his cattle he has the right accorded him by the company to have them kept, fed, watered, etc., and to sell them himself or by a commission merchant who need not be a member of the stock yards company.

It is plain to be seen that the privilege or facility for a sale of the cattle or other stock at the yards of such company is of precisely the same nature and character as that which exists at an exchange or board of trade which is so described in terms. That the sales are made by the owners of the cattle or by commission merchants who are not members of the

Opinion of the Court.

stock yards company, is not material. The facilities for a sale exist and are made use of in each case, and are in truth the same in each. A perusal of the facts contained in the record in the case shows that those yards answer all the purposes of an exchange or board of trade, and that they in truth amount in substance to the same thing. The differences existing between them are unsubstantial so far as this point is concerned. The sales at that place are accomplished with a facility which it is plain could not exist but for the conditions and advantages afforded by the use of those yards.

The owner of the cattle who brings them to the yards and avails himself of the privilege of selling them at that place does without doubt make use of a privilege which every one knows is an advantage sufficient to constitute a material difference between a sale at the yards and a sale elsewhere. This advantage, although one which any person could use, is yet of precisely the same nature as that existing in the case of an exchange or board of trade, and it is therefore a similar place within the meaning of the statute. Being a similar place, the reasons stated in the foregoing cases apply with equal force here and demand the same judgment.

For the reasons above stated, we make the following disposition of the cases before us :

In Nos. 435 and 625, the orders of the Circuit Court of the United States for the Northern District of Illinois are affirmed.

In No. 4 Original, the petition for a writ of *habeas corpus* is denied.

In No. 636, the judgment of the District Court of the United States for the Northern District of Illinois is affirmed.

So ordered.

MR. JUSTICE BROWN and MR. JUSTICE WHITE concurred in the result.